

**BEFORE THE COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND  
SITTING AS THE DISTRICT COUNCIL FOR THE MARYLAND-  
WASHINGTON REGIONAL DISTRICT IN  
MONTGOMERY COUNTY, MARYLAND  
Office of Zoning and Administrative Hearings  
Stella B. Werner Council Office Building  
100 Maryland Avenue, Room 200  
Rockville, Maryland 20850  
(240) 777-6660**

**IN THE MATTER OF:  
FOUNDATION FOR ADVANCED EDUCATION  
IN THE SCIENCES**

Applicant

Dr. Krishna Balakrishnan

Kevin Foster

Seth Churchill

George Myers

Anne (Nancy) Randall

Dr. Michael J. Lenardo

Kimberly Baxter Decker

For the Application

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Heather Dlhopsky, Esquire

Attorneys for the Applicant

\*\*\*\*\*

Martin Klauber, Esquire

Peoples Counsel

In Opposition to the Application

\*\*\*\*\*

Allen Myers, on behalf of the Maplewood

Citizens Association

Tyler D. Mace, Esquire<sup>1</sup>

Christina A. Gorski McDermott

Emmanuel Nwankwo

Dan Pierce

Edward Stern

Chris Connors

Annette Rothermel

Susan Cheney

Community Participants in Opposition

\*\*\*\*\*

Before: Martin L. Grossman, Hearing Examiner

Zoning Application No. G-882

**HEARING EXAMINER'S REPORT AND RECOMMENDATION**

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<sup>1</sup> Mr. Mace is a confronting homeowner, who acted formally as counsel only for himself at the hearing (10/26/09 Tr. 4); however, he called and questioned the other opposition witnesses, and cross-examined Applicant's witnesses.

**TABLE OF CONTENTS**

	<b>Page No.</b>
I. EXECUTIVE SUMMARY .....	3
II. STATEMENT OF THE CASE .....	4
III. FINDINGS OF FACT .....	7
A. SUBJECT PROPERTY .....	7
B. SURROUNDING AREA .....	10
C. ZONING HISTORY .....	13
D. PROPOSED DEVELOPMENT .....	14
E. SCHEMATIC DEVELOPMENT PLAN AND BINDING ELEMENTS .....	15
F. DEVELOPMENT STANDARDS FOR THE ZONE .....	21
G. CONSISTENCY WITH THE MASTER PLAN .....	25
H. PUBLIC FACILITIES .....	29
I. ENVIRONMENT .....	35
J. COMMUNITY CONCERNS AND COMPATIBILITY-DENSITY CONSIDERATIONS .....	38
IV. SUMMARY OF HEARING .....	57
A. APPLICANT’S CASE .....	58
B. THE PEOPLE’S COUNSEL .....	78
C. COMMUNITY RESPONSE .....	79
V. ZONING ISSUES .....	90
A. THE PURPOSE AND REQUIREMENTS OF THE ZONE .....	91
B. COMPATIBILITY .....	101
C. PUBLIC INTEREST .....	101
VI. CONCLUSIONS .....	103
VII. RECOMMENDATION .....	104

**I. EXECUTIVE SUMMARY**

Applicant:	Foundation for Advanced Education in the Sciences (FAES)
LMA No. & Date of Filing:	G-882, filed May 11, 2009
Zoning and Use Sought:	Zone: RT-8 Use: 31 Townhouses (including 4 MPDUs) to be occupied by up to 155 students ( <i>i.e.</i> , 5 per townhouse)
Current Zone and Use:	Zone: R-60; Current Use: Undeveloped except for 4 single-family, detached homes along the eastern frontage
Location:	West Cedar Lane and Cypress Avenue in Bethesda
Applicable Master Plan:	<i>1990 Bethesda-Chevy Chase Master Plan</i>
Acreage to be Rezoned:	4.0795 acres (177,703 sq. ft.)
Density Permitted in RT-8 Zone:	8 dwelling units per acre
Density Planned:	7.6 dwelling units per acre ( <i>i.e.</i> , 31 Dwelling Units on 4.08 acres)
Bldg. Coverage Allowed/Planned:	35% Maximum per §59-C-1.734 / 17% planned
Green Space Required/Planned:	50% Minimum per §59-C-1.734 / 67% planned
Parking Spaces Required/Planned:	62 required (2 spaces per unit) / 129 planned
Building Height Limits:	35 feet maximum allowed / 35 feet maximum planned
Environmental Issues:	The Site is not in a Special Protection Area. Technical Staff recommended approval of a forest conservation plan at subdivision if zoning is approved.
Consistency with Master Plan:	Project does not comport with the R-60 recommendation of the Master Plan.
Neighborhood Response:	Strong neighborhood opposition, and strong support from potential users of the site and the NIH related community
Technical Staff Recommends:	Denial
Planning Board Recommends:	Denial by 5 to 0 vote.
Hearing Examiner Recommends:	Denial

## II. STATEMENT OF THE CASE

Local Map Amendment No. G-882 was filed on May 11, 2009, by the Foundation for Advanced Education in the Sciences (“FAES”). It requests rezoning from the R-60 Zone to the RT-8 Zone of property known as Part of Lot 7, Lot 8-A, Lot 8-B, Lot 8-C, Lot 8-D, Lot 8-E and Lot 8-F, Alta Vista subdivision, located at 9204, 9206, 9208, 9214 Cypress Avenue and at 5201 and 5205 Cedar Lane, Bethesda, Maryland. It consists of 4.0795 acres (177,703 square feet) in the 7<sup>th</sup> Election District, just north of the National Institutes of Health (“NIH”) campus.

As described in its mission statement (Exhibit 24), “FAES is a non-profit foundation, located at the National Institutes of Health, that conducts advanced educational programs and supporting activities to promote the productivity and attractiveness of professional life on the NIH campuses. FAES programs complement the work of NIH in accomplishing its mission or research and training in the biomedical sciences.” FAES has not provided a large-scale housing operation for its students in the past, although it does currently rent two single-family homes to students on the subject site. FAES is now proposing a housing arrangement for up to 155 students in 31 townhouse units (*i.e.*, 5 students per townhouse) to be constructed on the subject property. The project would include four moderately priced dwelling units (MPDUs), which is approximately 12.5% of the proposed dwelling units, as required by the Montgomery County Code.

The application was filed under the Optional Method authorized by Code § 59-H-2.5, which permits binding limitations with respect to land use, density and development standards or staging. The proposal is set forth in a revised Schematic Development Plan (SDP), Exhibit 146(a), which contains an illustrative diagram and a specification of the binding elements, as well as other information regarding the development.

Thirty-one letters were received in support of the application (Exhibits 37, 38, 44, 47, 49, 55, 56, 59, 60, 62-64, 66-70, 72, 74, 78, 79 and 94) and forty-one in opposition (Exhibits 39-43, 45, 46, 53, 54,

57, 61, 71, 80-84, 86-88, 90-93, 95, 96, 98-103 and 105).<sup>2</sup> The pre-hearing opposition, led by the Maplewood Citizens Association (Ex. 103), raised three main concerns – that the proposed use would be inconsistent with the master plan; would not be an appropriate transitional use; and would not be compatible with the neighborhood. Other opposition letters raised concerns about impacts on traffic, parking and property values (*e.g.*, Ex. 46). Support for the application was based on the potential benefits to the community and the country from the young scholars who would reside at the subject site while working in NIH, and the desperate need for such housing near the NIH campus (*e.g.*, Ex. 44).

Technical Staff of the Maryland-National Capital Park and Planning Commission (“M-NCPPC”), reviewed the plans, and in a report dated September 28, 2009, recommended denial (Exhibit 85).<sup>3</sup> Prior to the Montgomery County Planning Board’s review of the application, Applicant sent the Planning Board a detailed response (Exhibit 89) to Technical Staff’s negative assessment of the requested rezoning. Nevertheless, when the Planning Board considered the application on October 8, 2009, it voted unanimously (5 to 0), to recommend denial of the application, as set forth in a memorandum dated October 9, 2009 (Exhibit 97).

A public hearing was duly noticed and convened on October 26, 2009, at which time the Applicant presented evidence and testimony in support of the application. Martin Klauber, the People’s Counsel, participated in the hearing, but he did not call any witnesses. A number of community witnesses, including the Maplewood Citizens Association (MCA), appeared at the hearing to express their opposition. The hearing could not be completed in one day, and it resumed on October 30, 2009.<sup>4</sup>

After the hearing was completed on October 30, 2009, the record was held open for additional filings by the Applicant (until November 13, 2009) and for responses thereto by Technical Staff and

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<sup>2</sup> Some of the support letters are form letters included under a single exhibit number (*e.g.* Exhibit 68); others have their own exhibit numbers. Some opposition letters are also included under a single exhibit number (*e.g.*, Exhibit 90).

<sup>3</sup> The Technical Staff Report is quoted and paraphrased frequently herein.

<sup>4</sup> There were two hearing dates. The transcript from the first is denoted “10/26/09 Tr. xx” and the second, “10/30/09 Tr. xx.”

interested parties (until November 20, 2009). Applicant sent a copy of its revised SDP to Technical Staff for review on November 2, 2009 (Exhibit 135) and filed a legal memorandum on November 12, 2009 (Exhibit 137), but no responses were received thereto.

On November 5, 2009, the Opposition's expert witness on property valuation, Chris Connors, filed a letter (Exhibit 136) attempting to add to his testimony offered at the hearing. Applicant objected to admission of Mr. Connor's post-hearing letter because there is no opportunity to further cross-examine him on the points raised in his letter. Exhibit 137, pp. 2-3. The Hearing Examiner agrees with Applicant on this point, and will not admit Mr. Connor's post-hearing letter.

The record closed, as scheduled, on November 25, 2009. However, in reviewing the file in this matter after the record had closed, the Hearing Examiner discovered that Applicant had apparently failed to file a fully executed copy of its covenants, as required by Zoning Ordinance §59-H-2.54(b). The Hearing Examiner therefore wrote to Applicant's counsel on December 2, 2009 (Exhibit 138), asking whether the missing document had been filed, and if not, giving Applicant until December 9, 2009 to file it and a letter requesting that the record be reopened to receive it.

On December 4, 2009, Applicant filed the executed Declaration of Covenants (Exhibit 139(a)) and a letter requesting that the record be reopened to receive it (Exhibit 139). On December 8, 2009, the Hearing Examiner informed all counsel (Exhibits 141 and 142) that a legislative history of the definition of the term "family" in the zoning ordinance and a zoning history of the subject site would be received into the record, as well as other specified exhibits filed after the last hearing date, but that an Order reopening and closing the record would not be issued until December 15, 2009, to give the parties an opportunity to comment. On December 10, 2009, the Hearing Examiner informed all counsel (Exhibit 143) that a statement from Montgomery County Public Schools (MCPS) regarding school capacity would also be sought and introduced into the record. Exhibit 144.

On December 15, 2009, the Hearing Examiner issued an order reopening the record to receive

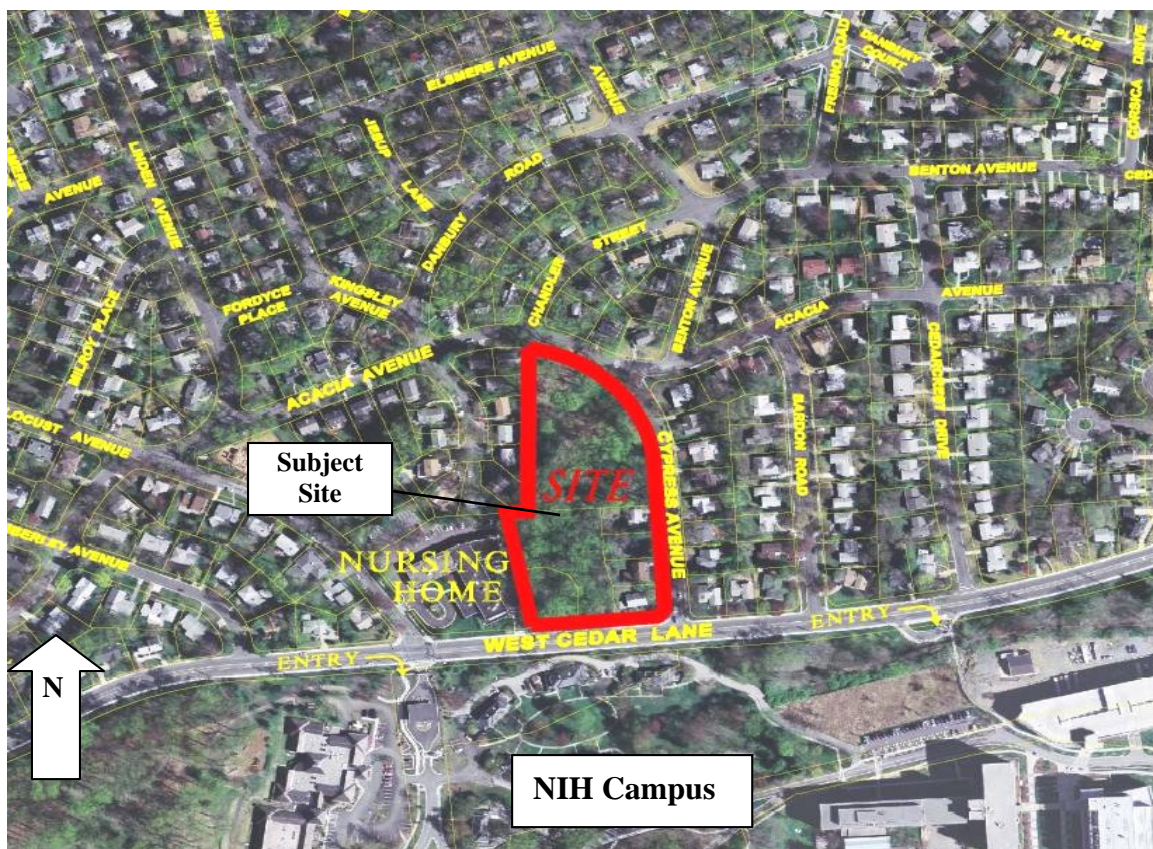
the executed covenants and the other items described above, and the record closed immediately thereafter on December 15, 2009. Exhibit 145.

On December 24 and December 28, 2009, the Hearing Examiner notified the parties that further review of the record (Exhibit 148) revealed additional errors in the executed covenants, and on January 12, 2010, Applicant requested that the record be reopened to receive final versions of the SDP (Exhibit 146(a)) and the covenants (Exhibit 147). The record was reopened by Order of January 14, 2010, and kept open by further Orders until February 5, 2010, at the parties' request, to give them an opportunity to comment upon legislative history officially noticed by the Hearing Examiner. Exhibits 149 -162.

### III. FINDINGS OF FACT

#### A. Subject Property

The subject property, which has an area of about 4.0795 acres (177,703 square feet), is located in the northwest quadrant of the intersection of West Cedar Lane and Cypress Avenue, across West Cedar Lane from the NIH campus, which is to the south. The site is in the R-60 Zone. The subject site and its immediate surroundings can be seen on the following aerial photograph (Exhibit 109):





Technical Staff reports that the seven contiguous lots that make up the subject property have approximately 280 feet of frontage along West Cedar Lane and 770 feet along Cypress Avenue. The site is developed with four single-family detached houses along the property's eastern Cypress Avenue frontage. The remaining portion of the site is undeveloped. All four houses are owned by the Applicant, and two of the four are currently being rented to FAES students. The topography of the site has a six percent grade due to an increase in elevation from east to west (*i.e.*, the site is 292 feet in elevation at Cypress Avenue along the eastern property line and rises to 316 feet at the property's western property line). Exhibit 85, p.4. The Applicant provided two ground-level photographs of the undeveloped subject site, shown below (Exhibit 28):

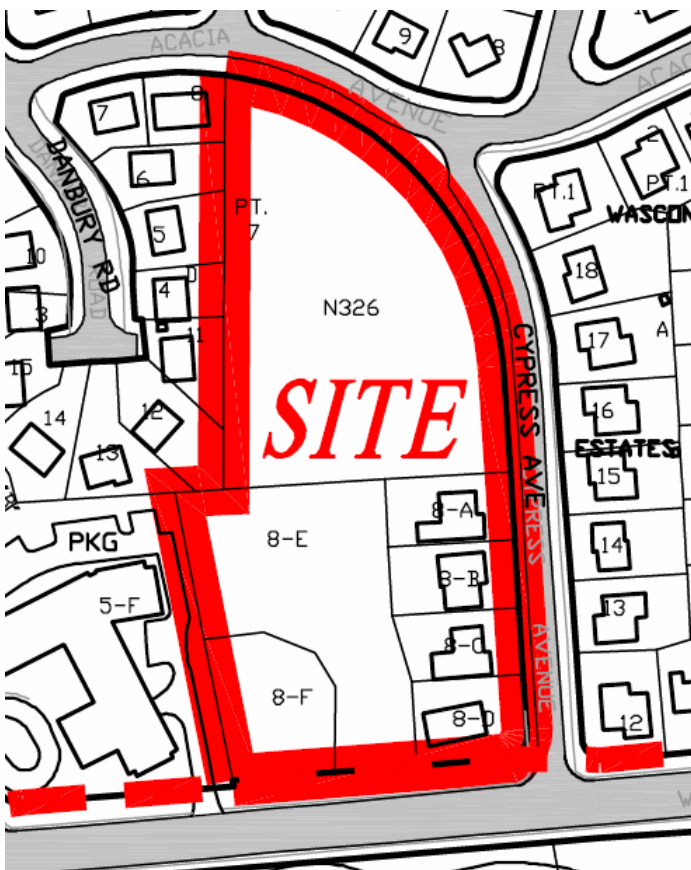


**Subject Site, as seen from West Cedar Lane and Cypress Avenue, Looking Northwest**





The subject site can also be seen in its current state, in diagrammatic form, juxtaposed against an aerial photo (Exhibits 16 and 17):



The four single-family detached dwellings which currently exist in the southeast corner of the subject property are apparent in the above exhibits. The wooded and undeveloped northern and western portions of the subject property are also visible, as are neighboring single-family detached homes. Applicant's land use expert, Kevin Foster, testified that other houses previously on the subject site have been removed. He described the subject site as relatively flat, but dropping off fairly dramatically (a 10 to 15 foot topographic change going from north to south), down to Cedar Lane. 10/26/09 Tr. 103-104. There is also a slope running west to east from the middle of the subject property over to Cypress Avenue. Cypress Avenue has a high point in it about midway along the subject property, sloping down in both directions, north and south.

There are no streams, wetlands, floodplains or associated buffers on the site, and Technical Staff did not indicate that the property is within a Special Protection Area or a Primary Management Area. There also are no steep slopes or highly erodible soils on site. Exhibit 85, Attachment 4. There are 3.15 acres of forest on site, including 10 significant and 20 specimen trees. Exhibit 85, p. 12.

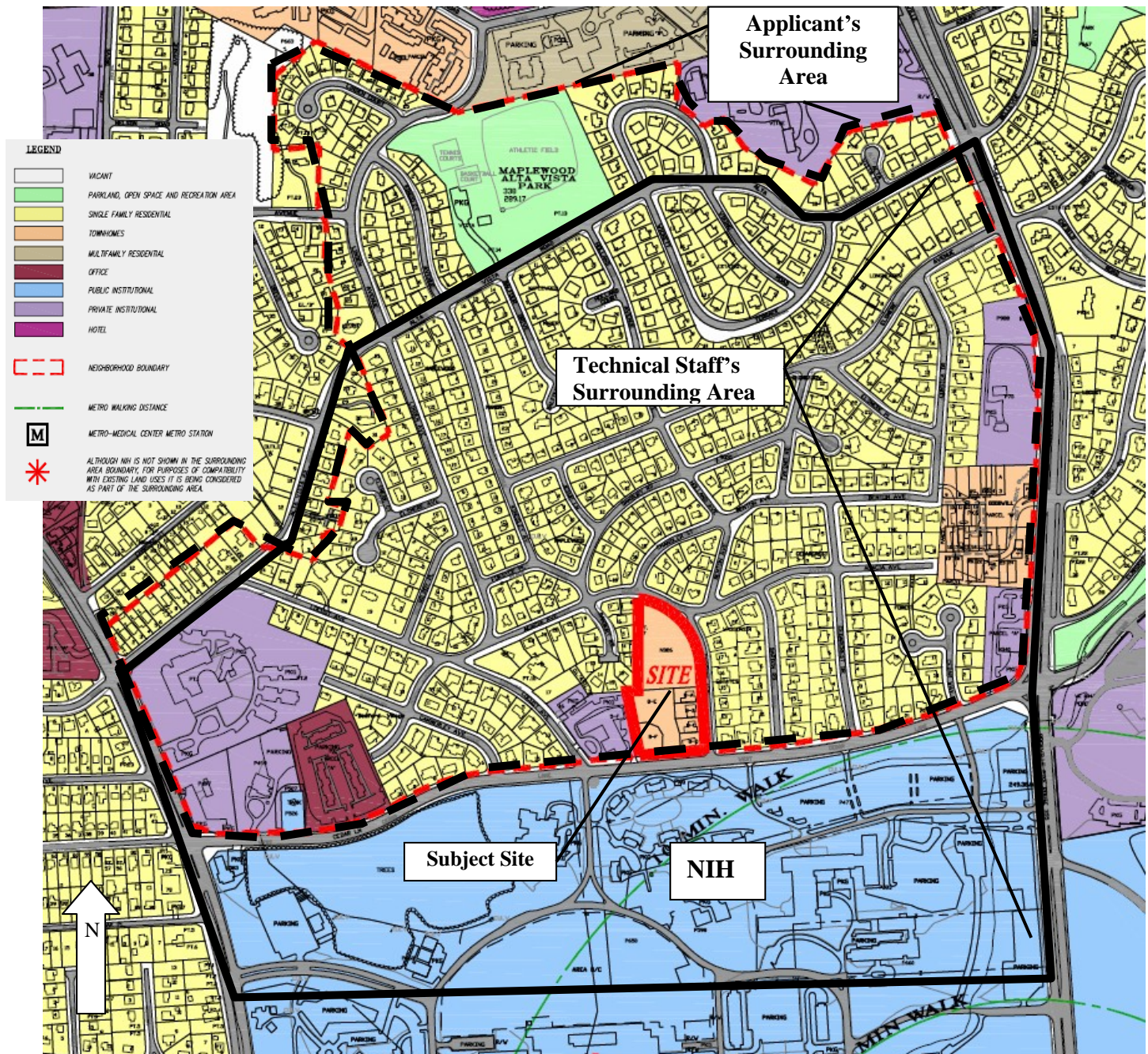
### **B. Surrounding Area**

The surrounding area must be identified in a floating zone case so that compatibility can be evaluated properly. The "surrounding area" is defined less rigidly in connection with a floating zone application than in evaluating a Euclidean zone application. In general, the definition of the surrounding area takes into account those areas that would be most directly affected by the proposed development.

Technical Staff defined the surrounding area as generally formed by Alta Vista Road to the north, Wisconsin Avenue (MD 355) to the east, NIH to the south, and Old Georgetown Road to the west. Exhibit 85, pp. 4-5. Petitioner's land use expert recommended a slightly larger surrounding area, one which would include Maplewood Alta Vista Park and single-family residential areas to the north of Alta Vista Road (but south of the commercial areas) and multi-family residences around



Pooks Hill Road. Both recommended area definitions are outlined below on the surrounding area map provided by Applicant (Exhibit 19). Technical Staff's proposed definition is shown as a solid line and Applicant's as a dashed line.<sup>5</sup>



<sup>5</sup> Although Applicant's dashed line does not include a portion of NIH, as does Technical Staff's solid line, Applicant notes that NIH is being considered as part of the surrounding area for purposes of evaluating compatibility with existing land uses. Exhibit 19.

The biggest difference between Mr. Foster's definition of the surrounding area and staff's is on the northern end, where, as can be seen on Exhibit 19, Mr. Foster included an area of single-family detached homes and Maplewood Alta Vista Park, all north of Alta Vista Road, within the surrounding area, and Staff did not. Mr. Foster reasoned that those homes belonged in the single-family residential area surrounding the subject site more than in the multi-family residential area north of the park.

10/26/09 Tr. 47-52. Though either definition of the surrounding area could be considered appropriate, the Hearing Examiner accepts Mr. Foster's more inclusive definition on the northern border, for the reasons he stated, and Technical Staff's larger outline on the southern border, because NIH (or at least the northern portion of it) is the confronting area to the south of the proposed development. The eastern border of the surrounding area (MD 355, which is also known as Wisconsin Avenue and Rockville Pike) is identical under both definitions. On the west, there are slight differences, and the Hearing Examiner sees no basis for deviating from Staff's designation of Old Georgetown Road and Alta Vista Road as the western border. In sum, Technical Staff's definition will be applied except for the northern border, where Applicant's defined border will be employed.

The surrounding area, as defined by the Hearing Examiner, is appropriate for determining whether the proposed zone will be compatible with surrounding uses, as this area captures virtually all nearby properties that may be affected by the rezoning and demonstrates the predominant land use pattern of the area. Technical Staff described the surrounding area, as follows (Exhibit 85, pp. 4-5):

The surrounding area is made up predominantly of detached single-family residential homes. In fact, the entire area is zoned under the R-60 zoning category, a category that seeks to establish mostly single-family detached housing. However, there are a few special exceptions – such as a scientific society, a philanthropic organization, and a medical clinic – present at the perimeter of the surrounding area along the main thoroughfares of Old Georgetown Road and Wisconsin Avenue. Bethesda Crest, a townhouse community developed under the R-60 Zone, is the only existing townhouse development in the surrounding area and is also located along Wisconsin Avenue. And, of course, NIH is an immense institutional presence making up the southern boundary of the surrounding area. Abutting the subject property to the north, east, and west are the well-established single-family detached neighborhoods of Maplewood and Alta Vista. Houses in the area are mostly brick

two-story or split level homes from the 1950s and 1960s. To the immediate west of the site is the Carriage Hill Nursing Home, a special exception use granted in 1970. Out of the 568 dwellings that comprise the surrounding area, there are only seven special exceptions operating out of single-family detached dwellings (a one percent incidence rate), which further provides evidence that the area is a largely untouched single-family detached neighborhood.

Mr. Foster also described the surrounding area. He testified that the majority of the surrounding uses are single-family, detached R-60 subdivisions throughout most of the surrounding area. There are several properties along the perimeter that contain other uses – American College of Cardiology along Old Georgetown Road; FAES; a social and academic center at the corner of Cedar and Old Georgetown; the Knights of Columbus; a medical office-townhouse community just to the east of that along Cedar Lane; the Carriage Hill nursing facility directly adjacent to the west side of the subject property; the regional headquarters for the Boy Scouts of America, on the corner of Wisconsin and Cedar Lane; the Bethesda Crest townhouses north of that; and a church facility north of the townhouses. Though platted as “Alta Vista,” it is considered to be the “Maplewood” community.

10/26/09 Tr. 47-52.

### **C. Zoning History**

The subject property was classified under the R-60 Zone in the 1958 Countywide Comprehensive Zoning. Technical Staff reports (Exhibit 142) that the property has retained the R-60 zoning classification continuously since 1958. In June of 1990, a sectional map amendment (SMA G-666) rezoned certain properties in the vicinity of the subject property from the R-60 Zone to the R-60/TDR Zone, but the subject property was not affected and retained its R-60 zoning.

In 1966, FAES requested a special exception for an Educational Institution, Private Club (BA-2031). However, the Board of Appeals dismissed the application without prejudice, citing the proposal’s lack of adequate parking and front setback requirements.



### D. Proposed Development

The Applicant proposes to remove four existing single-family, detached homes from the site, and to construct thirty-one townhouse units, including four MPDUs, to house up to 155 graduate students (five per dwelling unit) working on their post-graduate degrees at the nearby NIH campus.<sup>6</sup> Applicant's vision for the project was discussed by Dr. Krishna Balakrishnan, the executive director of FAES. Dr. Balakrishnan testified that if NIH is to be successful as a graduate program, it has to have some of the elements which universities have, one of which is to provide close affordable housing to the graduate students. He felt that the four acre lot at the corner of Cypress Avenue and West Cedar Lane would serve that purpose very well because of the proximity to NIH, and because it had a sufficient space to accommodate a large number of students. 10/26/09 Tr. 188-189.

A sense of Applicant's vision can be seen in the diagrammatic portion of the rendered schematic development plan (Exhibit 117), reproduced below, and in the architect's comparison of the existing site and the proposed site views (Exhibit 28), on the following page:



<sup>6</sup> Applicant argues that the five students would constitute a "family," as defined by the Zoning Ordinance. This claim has been the source of some dispute, and it will be addressed in Part III.J.3 of this report.





**Proposed Development and Existing Site, as seen from West Cedar Lane and Cyprus Avenue, Looking Northwest**



**Existing Site, as seen from Cyprus Avenue, Looking Southwest, and Proposed Development**

The proposed density of the development is 7.6 dwelling units per acre (*i.e.*, 31 units on 4.08 acres). The RT-8 Zone allows a base density of 8 units per acre (*i.e.*, 32 units on this 4.08 acre site), but that density may be increased when the number of MPDUs provided on site exceeds the minimum of 12.5% required by Montgomery County Code § 25A-5. In this case, Applicant has indicated that it will only provide the required 12.5% MPDUs, so the maximum density permitted would be the base density of 8 dwelling units per acre.<sup>7</sup>

### **E. Schematic Development Plan and Binding Elements**

Pursuant to Code § 59-H-2.52, the Applicant in this case has chosen to follow the “optional

<sup>7</sup> Earlier versions of the Schematic Development Plan (Exhibit 135(a)) and the Declaration of Covenants (Exhibit 139(a)) had language which indicated that the permitted density was up to 39 dwelling units (*i.e.*, 9.76 dwelling units per acre) when MPDUs are included. The Hearing Examiner advised the parties that that language was misleading because the maximum density permitted on a site with only 12.5% MPDUs is actually only 8 dwelling units per acre (*i.e.*, 32 dwelling units). Exhibit 148. Applicant therefore deleted the language regarding bonus density from both its SDP and its covenants, filing a revised SDP (Exhibit 146(a)) and revised covenants (Exhibit 147).

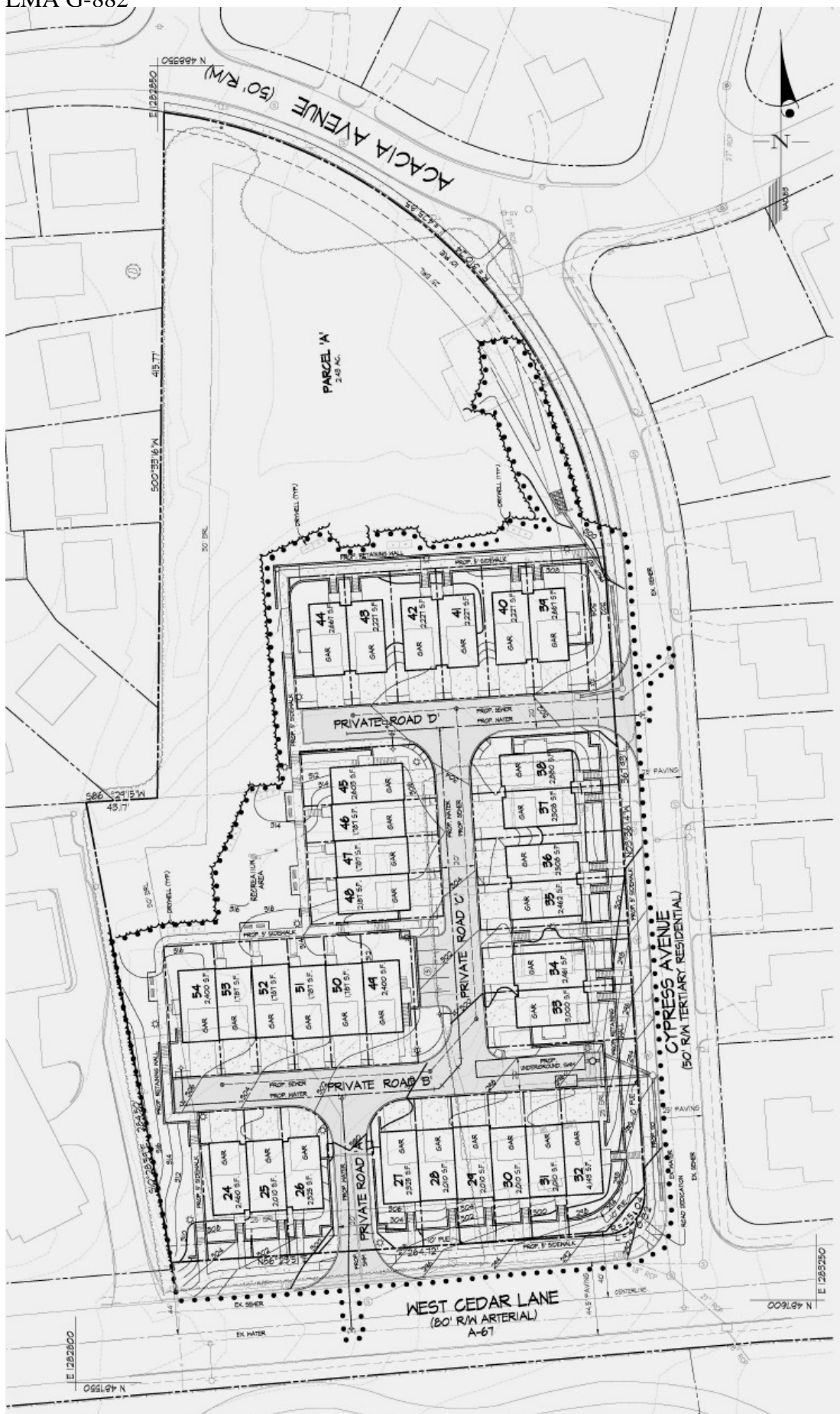
method” of application. The optional method requires submission of a schematic development plan (SDP) that specifies which elements of the plan are illustrative and which are binding, *i.e.*, elements to which the Applicant consents to be legally bound. Those elements designated by the Applicant as binding must be set forth in a Declaration of Covenants to be filed in the county land records if rezoning is approved. The Applicant has filed the required Declaration of Covenants in the record of this case as Exhibit 147.

The legal effect of the covenants is to obligate any future owner of the property to comply with the binding elements specified on the SDP. Thus, the optional method allows an applicant to specify elements of its proposal that the community, reviewing agencies and the District Council can rely on as legally binding commitments. Illustrative elements of the SDP may be changed during site plan review, but the binding elements cannot be changed without a separate application to the District Council for a schematic development plan amendment.

There are only two binding elements offered by Applicant in this case (Exhibit 147, p.3):

1. Pursuant to Section 59-C-1.73 of the Zoning Ordinance, under the R-T 8.0 Zone the maximum density of development is 8 dwelling units per acre, for a total of 32 units on the Property. Despite that 32 dwelling units are permitted on the Property, the Owner will limit the number of dwelling units on the Property to not more than 31 dwelling units at a density of 7.6 dwelling units per acre.
2. 12.5% of the dwelling units on the Property will be moderately priced dwelling units, for a maximum of four (4) moderately priced dwelling units on the Property.

The binding elements are also shown, in abbreviated fashion, on the face of the SDP as part of the listed Development Standards for the RT-8 Zone and Applicant’s compliance therewith. The listing of the Development Standards, as well as “General Notes,” “Site Data” and the illustrative site layout of the SDP (Exhibit 146(a)), are reproduced on the following pages of this report. The SDP shows 31 townhouse units (numbered from 24 through 54), located entirely on the southern end of the subject site. The northern and northwestern portions of the site would remain tree covered.



## DEVELOPMENT STANDARDS R-T 8.0 - Optional Method (MPDU)

	REQUIRED/PERMITTED	PROPOSED	BINDING
Minimum Tract Area:	20,000 sq (0.46 Ac.)	4.08 Acres	-
Density:	Base Density (w/ 12.5 % MPDU's): 32 D.U. (8.0 D.U. / Ac. x 4.08 Ac. = 32 D.U.)	31 Units	31 Units
Moderately Priced Dwelling Units (MPDU): (12.5% of total units)	12.5%	4 Units (12.5% of 31 Units)	12.5% of total
Building Setbacks:			
- From any detached dwelling lot or land classified in a single- family detached residential zone	30 feet	30 feet minimum	-
- From any public street	25 feet	25 feet minimum	-
- From an adjoining lot:			
- Side (end unit)	10 feet	10 feet minimum	-
- Rear	20 feet	20 feet minimum	-
Maximum Building Height			
Main Building	35 feet	35 feet	-
Accessory Building	25 feet	25 feet	-
Maximum Lot Coverage	40%	17% (0.70 Acres)	-
Minimum Green Area	50%	67% (2.73 Acres)	-
Off-street Parking	62 spaces (2.0 Sp/ D.U. X 31 D.U. = 62 Spaces)	129 total spaces (4.16 spaces / D.U.) 62 garage spaces 62 driveway spaces 5 visitor spaces	-

## SITE DATA

- |                     |   |
|---------------------|---|
| 1. EXISTING ZONING: | R-60 - RESIDENTIAL, ONE-FAMILY  |
| 2. PROPOSED ZONING: | RT-8.0 - RESIDENTIAL, TOWNHOUSE   |
| 3. SITE AREA:       | 4.08 Ac.<br>PART OF LOT 7, ALTA VISTA SUBDIVISION, 2.09 Ac.<br>LOT 8A, ALTA VISTA SUBDIVISION, 0.18 Ac.<br>LOT 8B, ALTA VISTA SUBDIVISION, 0.18 Ac.<br>LOT 8C, ALTA VISTA SUBDIVISION, 0.17 Ac.<br>LOT 8D, ALTA VISTA SUBDIVISION, 0.21 Ac.<br>LOT 8E, ALTA VISTA SUBDIVISION, 0.91 Ac.<br>LOT 8F, ALTA VISTA SUBDIVISION, 0.34 Ac. |
| 4. EXISTING USE:    | RESIDENTIAL / VACANT  |
| 5. PROPOSED USE:    | RESIDENTIAL - SINGLE FAMILY TOWNHOUSES<br>(SCHOLAR RESIDENCES)  |

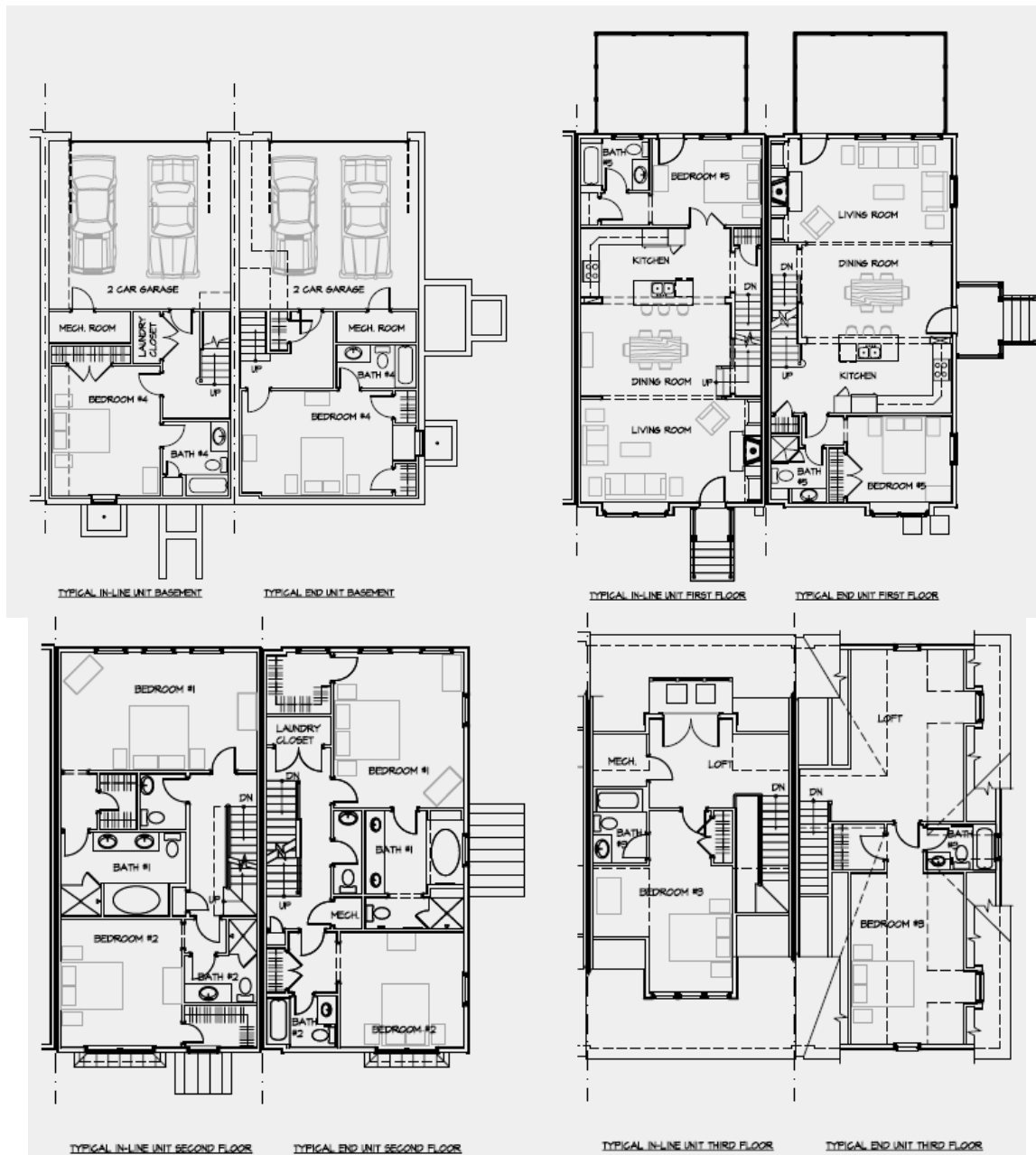
## GENERAL NOTES

1. OWNER: FOUNDATION FOR ADVANCED  
EDUCATION IN THE SCIENCES  
1 CLOISTER COURT  
BETHESDA, MARYLAND 20814  
ATTN: DR. KRISHNA BALAKRISHNAN  
PHONE: 301.496.7976
2. BOUNDARY: GUTSCHICK, LITTLE, & WEBER, P.A., SEPTEMBER, 2008.
3. TOPOGRAPHY BY: GUTSCHICK, LITTLE, & WEBER, P.A., JUNE, 2008.
4. PROPOSED WATER AND SEWER SERVICE WILL BE PUBLIC. THE EXISTING WATER AND SEWER CATEGORIES ARE W-1, S-1.
5. NRI/FSD BY: GUTSCHICK, LITTLE, & WEBER, P.A., APPROVED NOVEMBER 24, 2008.
6. WATERSHED: ROCK CREEK WATERSHED, USE CLASS I
7. NO KNOWN RARE, THREATENED OR ENDANGERED SPECIES ON SITE.
8. NO KNOWN HISTORIC FEATURES ON SITE.
9. THERE ARE NO KNOWN TREES ON THE SUBJECT PROPERTY THAT ARE COUNTY AND OR STATE CHAMPION TREES. THERE ARE NO TREES ON THE PROPERTY THAT HAVE A DBH OF 15% OR MORE OF THE DBH OF THE CURRENT COUNTY AND OR STATE CHAMPION TREE.
10. DEVELOPMENT PROGRAM: THIS PLAN WILL BE DEVELOPED IN ONE PHASE.
11. ALL UTILITIES ARE CONCEPTUAL AND SUBJECT TO CHANGE. SEE APPROPRIATE APPROVED UTILITY DRAWINGS.
12. THERE IS NO 100-YEAR FLOODPLAIN ON THIS SITE.

All of the proposed townhomes will have four floors (a lower level which is partially under ground, plus three above-ground stories), and their height will be limited to 35 feet. All townhomes will have two-car garages and driveways deep enough to stack two extra cars (*i.e.*, the driveway cars would have to be moved for cars to exit the garage). In addition, five guest parking spaces would be provided within the development. Technical Staff counts this parking setup as providing a total of 67 spaces (62 in the garages plus the 5 guest spaces)(Exhibit 85, pp. 6 and 14); however, Applicant counts the parking setup as providing 129 parking spaces because it counts the stacked driveway spaces. The parking issue will be discussed in the part of this report which addresses community concerns.

According to the applicant, each townhouse will have five bedrooms, with each bedroom being

leased to a separate student. Each bedroom will have its own bathroom. Using a floor plan of a typical unit (Exhibit 118), Applicant's architect, George Myers, described their design. The lower level has a rear entrance garage for two cars, stairs that go up, and a bedroom/bath suite. On the next floor is a common area which is a living/dining room/kitchen. There is also another bedroom and bath suite. On the next floor up are two bedrooms and two baths. In the attic, there is a single bedroom and bath. So, it adds up to a common area, which is kitchen/living/dining room, and five separate bedroom/bathroom suites. 10/26/09 Tr. 156-157. These features can be seen in the following typical floor plans from Exhibit 27:





## **F. Development Standards for the Zone**

Special regulations for the RT-8 Zone are spelled out in Zoning Ordinance §59-C-1.72, beginning with the stated “Intent and Purpose” of the Zone in §59-C-1.721. The issue of whether the subject application comports with the intent and purpose of the RT-8 Zone is discussed later, in Part V.A. of this report. We turn now to the other regulations of the Zone.

Although one stated intent of the R-T Zone is “to provide the maximum amount of freedom possible in the design of townhouses and their grouping,” the Zone nevertheless has special row design requirements for townhomes. Zoning Code §59-C-1.722. The maximum number of townhouses in a group is eight; and three continuous, attached townhouses are the maximum number permitted with the same front building line. Variations in the building line must be at least 2 feet.

The illustrative layout on the SDP(Exhibit 146(a)) shows that these requirements have been met. All the groups with more than three units show the required variation in their front building lines.

Zoning Ordinance §59-C-1.723 is inapplicable because Applicant has not sought to combine R-T-zoned tracts with different residential zones; rather, Applicant seeks to have the entire subject site reclassified into the RT-8 Zone. The Development Standards for the RT-8 Zone are spelled out in Zoning Ordinance §59-C-1.73 for developments without bonus-density MPDUs<sup>8</sup> and in §59-C-1.74 for developments with bonus-density MPDUs. Based on the entire record, the Hearing Examiner finds that the proposed development would meet or exceed the applicable development standards for the RT-8 Zone. However, there are two issues regarding these development standards that must be addressed because they have led to a degree of confusion as this case progressed to and through the hearing stage.

The first is the question of the minimum percentage of the tract which must be devoted to green

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<sup>8</sup> *i.e.*, Bonus density is permitted when the number of MPDUs exceed 12.5%.

area. In its initial SDP (Exhibit 9), Applicant listed the minimum required green area as 45% because that is what is required by Zoning Ordinance §59-C-1.74(d)(1) when the development includes MPDUs and a reduction in green area is “necessary in order to accommodate the increased density.”

Applicant’s earlier SDP also indicated that Applicant proposed to provide only the 45% green area required by that provision. Technical Staff relied on that figure in concluding that Applicant was planning to provide only 45% green area (Exhibit 85, pp. 13-14). Staff determined that 45% green area on this project would fail to meet the applicable standard, which is 50% under Zoning Ordinance §59-C-1.734(b),<sup>9</sup> for projects without MPDUs, and even for projects with MPDUs that do not need to decrease green area to accommodate increased density, as provided in §59-C-1.74(d)(1). Staff reasoned that the 45% figure applied only when the number of MPDUs being provided exceeded the legal minimum, because if only the legal minimum of 12.5% were being provided, there would be no bonus density and therefore no need to accommodate increased density. This ostensible failure to provide the statutorily required green area served as one basis for Technical Staff’s recommendation that this application be denied. Exhibit 85, p. 1.

On October 2, 2009, prior to the Planning Board’s consideration of this case, Applicant wrote to the Planning Board to take issue with Technical Staff’s conclusion regarding green area, as well as other parts of Staff’s evaluation (Exhibit 89). Applicant noted that there was confusion over the amount of green area it was actually proposing. In fact, Applicant intends to provide 67% green area, far greater than is required under either Code provision. Applicant provided the Planning Board with a revised SDP (Exhibit 69(d)), showing that the minimum required green area is 50%, as specified in Zoning Ordinance §59-C-1.734(b), and that a green area of 67% (2.73 acres) was being proposed.<sup>10</sup>

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<sup>9</sup> To add to the confusion over this issue, there is a typographical error in the numbering of this section of the Zoning Ordinance. It should be labeled Section “59-C-1.734,” but it is actually mislabeled Section “59-C-1.34.”

<sup>10</sup> The Hearing Examiner views this error as a self-inflicted wound by Applicant, not an error by Technical Staff, which was entitled to rely on the language in Applicant’s initial SDP specifying the green area that was “proposed” as “45% (1.84 Acres).”

Although the Planning Board still recommended denial of the application, it did not do so based on inadequate green area; rather the Planning Board found that the RT-8 Zone is not appropriate at this location; that it was not designated for the RT-8 Zone by the applicable Master Plan; that it would not qualify as an appropriate transition; and that the proposed density is not compatible with the prevailing density in the surrounding area. Exhibit 97.

The SDPs filed at the hearing and thereafter all specified that the required green area is 50%, and that a green area of 67% (2.73 acres) was being proposed. Exhibits 116, 124 and 146(a). The changes to the SDP thereafter reflect the second issue regarding developmental standards, the required maximum of building coverage. The initial SDP (Exhibit 9) and its successor provided to the Planning Board (Exhibit 89(d)), as well as the SDP initially filed at the OZAH hearing (Exhibit 116), all specified that the minimum lot (*i.e.*, building) coverage required by the Zoning Ordinance was 40%, and that Applicant proposed to cover no more than 40% of the tract with buildings. This was the same kind of error that led to the green area confusion, since Applicant actually proposed to cover only 17% of the tract with buildings. 10/30/09 Tr. 7-8. A revised SDP was therefore submitted at the second day of the hearing, specifying that Applicant proposed only 17% (0.70 acres) building coverage. Exhibit 124. That corrected SDP was forwarded to Technical Staff as Exhibit 135(a), for its review, and the Hearing Examiner is satisfied that with these corrections, the proposed SDP (Exhibit 146(a), in its final form) meets the development standards for the RT-8 Zone.<sup>11</sup>

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<sup>11</sup> It should be noted that the SDP (Exhibit 146(a)) offered by Applicant lists the required maximum building coverage as 40%. That figure comes from Zoning Ordinance §59-C-1.74(c), which applies only when MPDUs are included in the development. The Hearing Examiner believes that the maximum building coverage figure probably should be 35%, which is the figure provided by Zoning Ordinance §59-C-1.734(a) for developments which do not have MPDUs. Although this development will have MPDUs, it will not have any more than are required by law (*i.e.*, 12.5%), and therefore would not be entitled to any bonus density or any need for a lesser requirement of maximum building coverage. Applicant argues that this distinction applies to the minimum of green area required by Zoning Ordinance §59-C-1.74(d), but not to the maximum building coverage because the former contains the prelude “If necessary in order to accommodate the increased density,” while the latter has no such prelude. 10/26/09 Tr. 108-111. The Hearing Examiner believes that the extra prelude should be viewed as an additional showing that must be made by an Applicant when it seeks to reduce green area because of its addition of MPDUs, not as a reduction in the maximum building coverage provision merely because MPDUs required by law have been provided. This issue need not be decided in this case because Applicant’s proposal calls for an actual building coverage of 17%, as discussed above, which is well

The development standards table in the Technical Staff report (Exhibit 85, p. 14) is reproduced below with corrections for green area and the addition of building coverage standards. There is also a correction in a typo regarding the number of parking spaces proposed, which is 67 (not 65), if one does not include stacked driveway spaces. This correction was announced at the hearing. 10/26/09 Tr. 8.

<i><b>Development Standard</b></i>	<i><b>Standard</b></i>	<i><b>Provided</b></i>	<i><b>Applicable Zoning Provision</b></i>
<i>Minimum Tract Area</i>	20,000 sq ft (.46 acres)	177,725 sq ft(4.08 acres)	§59-C-1.731(a)
<i>Maximum Density</i>	8 dwelling unit per acre	7.6 dwelling unit per acre	§59-C-1.731(b)
<i>Building Setback from Land Classified in One-family Detached Zone</i>	30 ft	30 ft	§59-C-1.732(a)
<i>Building Setback from Public Street</i>	25 ft	25 ft	§59-C-1.732(b)
<i>Building Setback from an Adjoining Side Lot</i>	10 ft	10 ft	§59-C-1.732(c)(1)
<i>Building Setback from an Adjoining Rear Lot</i>	20 ft	20 ft	§59-C-1.732(c)(2)
<i>Max Building Height</i>	35 ft	35 ft	§59-C-1.733(a)
<i>Maximum Building Coverage</i>	35%	17%	§59-C-1.734(a) <sup>12</sup>
<i>Minimum Percentage of Green Area</i>	50%	67%	§59-C-1.734(b) <sup>13</sup>
<i>Parking</i>	2 spaces per townhouse = 62 spaces	67 spaces (129 spaces if including stacked driveway parking)	§59-C-1.735 and §59-E-3.7

below the maximum under either Code provision. Nevertheless, because the 40% figure, rather than the 35% figure is listed in the SDP as the required maximum, the Hearing Examiner did not want to give a tacit imprimatur to what he considers an incorrect figure.

<sup>12</sup> This section is mislabeled Section “59-C-1.34.” in the Zoning Ordinance.

<sup>13</sup> This section is mislabeled Section “59-C-1.34.” in the Zoning Ordinance.

### **G. Consistency with the Master Plan**

The subject site is located in the area subject to the *1990 Bethesda-Chevy Chase Master Plan*. As mentioned at the beginning of this report, the property is currently classified in the R-60 zone, and has been for over 50 years. The Master Plan expressly calls for the subject site to remain in the R-60 Zone. The recommendation for R-60 on the subject site is made not only as part of a larger “Mid-Bethesda” area recommendation, but also as a specific recommendation for this site in Table 5 on page 52 of the Master Plan. The subject site is identified there as Sites M1 and M2, which are recommended for the R-60 Zone with a use of “Single-family” homes, and the table defines the term “Single-family” as meaning “single-family detached” homes.

Since the subject application seeks to have the property rezoned to RT-8, it is obviously not consistent with the specific R-60 zoning recommendation of the Master Plan. However, this fact does not automatically rule out this application because consistency with the Master Plan is not a statutory requirement of the RT-8 Zone.<sup>14</sup> *Mayor and Council of Rockville v. Rylyns Enterprises, Inc.*, 372 Md. 514, 530, 814 A.2d 469, 478 (2002) (citing *Richmarr*, 117 Md. App. at 635-51, 701 A.2d at 893-901 (1997)). Nevertheless, consistency with the Master Plan recommendations, goals and objectives is still considered as part of the evaluation of public interest made in every re-zoning case.

As a result, there was much testimony in this case about the Master Plan. Applicant argued that even though the Master Plan did not specifically recommend the RT-8 zone, the requested

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<sup>14</sup> Precisely what is meant by the term “consistent with” in the context of master plans has been the subject of both litigation and legislation. In *Trail v. Terrapin Run*, 403 Md. 523, 548, 569 and 573-574; 943 A.2d 1192 (2008), the Maryland Court of Appeals held that legislative words such as “conform to” a master plan and “consistent with” a master plan were intended to convey the concept of being generally “in harmony with” the master plan, unless the legislation specified otherwise. Subsequently, the Maryland legislature enacted the *Smart, Green, and Growing - Smart and Sustainable Growth Act of 2009*, effective July 1, 2009. That Act amended Md. Ann. Code Art. 66B, § 1.02, in an attempt to define the term “consistent with” to strengthen master plan impact on land use; however, Applicant correctly points out that, by its terms, the statute does not apply to rezoning applications because they do not constitute an “action” under the legislation. Moreover, when a site is located in a Priority Funding Area (PFA), as the evidence indicates this site is, the term “action” omits “land uses and densities or intensities” from the comprehensive plan factors included in the term “action.” Exhibit 137. The Hearing Examiner thus concludes that that 2009 legislation does not apply to the instant rezoning application, and even if it did apply to rezonings, it would not determine the outcome in this case because, as mentioned above, consistency with the master plan is not a statutory requirement for the zone sought by Applicant.

reclassification would satisfy the goals and objectives of the Plan. The opposition countered with both the specific recommendations of the Plan and other language in the plan regarding its goals and objectives.

Applicant's land use expert, Kevin Foster quoted from various pages of the Bethesda-Chevy Chase Master Plan (pp. 4, 5, 19 – 22, 25, 26 and 29) in an effort to show that although the Plan did not designate the site for the RT-8 Zone, that zone would meet the goals and objectives of the Master Plan. 10/26/09 Tr. 75-92 and Exhibit 21, pp. 5-9 and Exhibit 115).

Specifically, Mr. Foster referenced the following goals and recommendations in the Master Plan:

Page 4: The plan recognizes the importance of biomedical and medical oriented employment in Chevy Chase.

Page 5: Environmental resources, ¶6, recommends locating higher densities development near transit stations. The subject property is within a 15 minute walk of the metro, Medical Center metro station and is served by a major metro bus route that serves two other additional metro stations and a regional shopping center.

Page 19: The general goals and objectives, ¶ 3, recommends providing a balanced and affordable housing supply; and ¶ 4, under land use zoning goals and objectives, recommends protecting the high quality residential communities throughout the planning area, as well as services and environmental quality that enhance the area. The same section, however, also recommends reconfirming zoning for existing single-family detached residential areas, maintaining and enhancing residential communities along major highways and arterials, and protecting the environment, environmental character and cultural resources throughout the planning.

Page 20: Under public facilities, community goals and objectives, ¶ 7 recommends contributing to the strong sense of community and helping to reinforce community cohesion. Also, increasing housing in Bethesda will reduce commuting to local employment.

Page 21: In a discussion of development levels, ¶5 recommends increased housing densities and types, "where compatible with nearby properties."

Page 22: ¶3 recommends directing both employment and housing in areas near transit stations.

Page 25: Under housing development objectives, the plan encourages a wider variety of housing types to meet the varied needs of the population and their placement near employment centers, Metro stations "and in other areas zoned for higher density."



Page 26: The Plan restates the need to provide affordable housing.

Page 29: Under area-wide land use objectives, the plan recommends increasing housing choice by allowing townhouse development “where compatibility criteria can be achieved.”

Anne (Nancy) Randall, Applicant’s expert in traffic engineering and transportation planning also testified that the proposed development would meet a goal of the Master Plan to reduce use of the public roads and facilitate pedestrian traffic because locating the students across the street from their place of study reduces the need for these individuals to drive during the rush hours and because additional sidewalk would be added, with few curb cuts. 10/30/09 Tr. 40-42.

Mr. Foster felt that Technical Staff relied exclusively on Table 5 from page 52 of the Master Plan. It contains the Mid-Bethesda land use and zoning recommendations for parcels M-1 and M-2, which are the two vacant parcels that are part of the subject property. That chart recommends the R-60 Zone for the site. Mr. Foster opined that master plans need to be taken as a whole when analyzing the needs and goals and when looking at recommendations, especially since the master plan was written 20 years ago, and many things have changed. 10/26/09 Tr. 75-92 and Exhibit 21, pp. 5-9.

In response, Allen Myers, testified on behalf of the Maplewood Citizens Association that the Master Plan makes its intention very clear, on pages 51, 52, 59 and 60, to keep the R-60 Zone throughout the planning area. The Plan’s objectives include maintaining residential neighborhoods in the current zoning (pp. 1 and 3). 10/30/09 Tr. 194-196, 222-224 and 245-246.

Technical Staff analyzed the Master Plan’s recommendations as follows (Exhibit 85, pp. 9-10):

The property is located within the geographic area covered by the 1990 *Bethesda-Chevy Chase Master Plan*. The site is within the Mid-Bethesda/Northern Bethesda area of the Plan, which specifies neighborhood preservation and community cohesion as a goal for the area. The existing zoning scheme was retained for the area to “ensure the continuation of the existing residential character and patterns so well established here.” The Plan goes further and specifically mentions recommendations for the subject property on page 52. **The Plan recommends that the subject property be developed under the R-60 Zone with single-family detached homes and trees preserved around the perimeter of the site and along West Cedar Lane**

**to ensure conformance with nearby housing.** Since the Master Plan identifies other specific properties as suitable for townhouse or clustered development, staff finds it reasonable to assume that the Master Plan considered this option for the subject site and found it to be inappropriate. [Emphasis added.]

Lastly, staff is concerned about placing a large volume of student housing in this well-established, stable neighborhood. One of the main goals in the Plan for this area is to “contribute to a strong sense of community and help reinforce community cohesion.” As student housing can be of a transitory nature, this type of housing may conflict with the Plan’s goals. [Footnote omitted.]

Technical Staff concluded (Exhibit 85, p. 2): “The project is inconsistent with the recommendations of the 1990 Bethesda-Chevy Chase Master Plan.” The Planning Board agreed with Technical Staff’s finding of inconsistency with the Master Plan. Exhibit 97.

While consistency with the Master Plan is not a requirement of the R-T Zones, consideration of the Master Plan’s recommendations is a factor which is always considered in our evaluation of the public interest. It is a general rule of statutory (and regulatory) construction that the specific governs the general. *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170 (2007), and *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-385 (1992). The specific recommendation for these parcels is that they remain in the R-60 Zone.

The Hearing Examiner finds that although the proposed development might fulfill some of the general language of the Master Plan, it would not fulfill other general language regarding objectives of the plan; nor would it accomplish the goals and objectives of the Sector Plan for this area to the extent that retaining the R-60 Zone would. It is undisputed that it would not conform to the specific recommendations of the Master Plan for the subject site or its immediate area. Given this record, the Hearing Examiner finds that this development would not be consistent with the recommendations, goals and objectives of the Master Plan.<sup>15</sup>

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<sup>15</sup> There was much discussion at the hearing about the impact of the NIH Master Plan (Exhibit 133) on this case. That plan is not discussed in this section because it is not part of the County’s zoning process, but it does bear on at least one issue in this case – whether there is a need for transition between the neighborhood and the NIH campus. That issue will be discussed In Part V of this report.

## **H. Public Facilities**

Under the County's Adequate Public Facilities Ordinance ("APFO," Code §50-35(k)), an assessment must be made as to whether the transportation infrastructure, area schools, water and sewage facilities, and other services will be adequate to support a proposed development, and in turn, whether the proposed development will adversely affect these public facilities. Both the Planning Board and the Council have roles to play in this assessment process.

The Planning Board reviews the adequacy of public facilities at subdivision, under parameters that are set by the County Council in the Growth Policy and biennially in the two-year, Growth Policy Element. While the final test under the APFO is carried out at subdivision review, the District Council must first make its own evaluation as to the adequacy of public facilities in a rezoning case because the Council has the primary responsibility to determine whether the reclassification would be compatible with the surrounding area and would serve the public interest. The Council's evaluation of public facilities at the zoning stage is particularly important because of the discretionary nature of the Council's review and the fact that the scope of Council's review is much broader at the zoning stage than that which is available to the Planning Board at subdivision, a process designed to more intensively examine the "nuts and bolts" of public facilities.

### 1. Transportation

As proposed, the development will have ingress and egress from both West Cedar Lane and Cypress Avenue. Anne (Nancy) Randall, Applicant's expert in traffic engineering and transportation planning testified (10/30/09 Tr. 13-79) that a full traffic impact study was not required in this case to satisfy Local Area Transportation Review (LATR), because the project would not generate more than 30 trips during either the morning or evening peak hours. Ms. Randall prepared a letter and submitted it to staff on August 27, 2008 (Exhibit 20) indicating that, based on Park and Planning trip generation rates for townhouses, the 31 townhomes will generate a total of 15 trips in the morning and 26 in the

evening peak hours. Subtracting out the trips generated now by the existing single-family homes, there will be a net increase of 11 trips in the morning and 21 in the evening peak hours.<sup>16</sup>

Local area review studies traffic impact on intersection capacity using a critical lane volume standard. The critical lane volume threshold permitted in the Bethesda/Chevy Chase policy area is 1600. Given the small number of trips that would be generated, Applicant was not required to determine their impact on the critical lane volumes in this case.

In policy area mobility review (PAMR), Technical Staff sets a level at which any new project that comes forward must mitigate a certain percentage of the new trips that will be generated, and that percentage of mitigation can range anywhere from zero percent to 100 percent. In this particular case, for the Bethesda/Chevy Chase policy area, that mitigation requirement is 30 percent, so Applicant will be required, independent of anything required for the local area review study, to mitigate 30 percent of the new trips.

An applicant does not necessarily have to mitigate trips at the specific development site. There are different ways in which Park and Planning will accept mitigation. It may be through improvement of sidewalks, bike trails, bus shelters, pedestrian count-down signals, or other methods of facilitating the use of transportation, or a payment of \$11,000 per new trip that is being generated. Technical Staff must approve whatever methodology is employed to reach this 30 percent mitigation.

Applicant's PAMR mitigation responsibility, therefore, would be 30 percent of 21 PM trips because that is the higher peak-hour trip number. That amounts to a mitigation requirement of 6 or 7 trips, which can be met by the payment of \$11,000 per trip. However, Ms. Randall believes that the

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<sup>16</sup> The Hearing Examiner notes that there is an arithmetic discrepancy in Ms. Randall's calculation, because she testified that the existing homes currently generated 4 trips in the morning and in the evening, but when she subtracted that 4 trip number from the projected 26 evening trips generated by the proposed townhouses, she got a net of 21 new trips, instead of 22. 10/30/09 Tr. 22-23. Technical Staff counted the difference as 22. Exhibit 85, p. 10. Actually, the error comes from an addition mistake in Table 1 of Ms. Randall's Traffic Letter (Exhibit 20), where she adds 3 and 2 for the existing evening peak hour trips and gets 4, instead of 5. If she had plugged the 5 into her calculations, she would have ended up correctly at a net trip difference of 21. The difference may have an impact on determination of mitigation required in this case. Ms. Randall testified that the PAMR mitigation would be 6 trips, based on 30% of 21. According to Staff, Applicant must mitigate 7 trips, based on 30% of 22. Exhibit 85, p. 11.

reduction of trips at the site will probably be much higher because of the intended use by FAES, the proximity of the residents to their work site, the available pedestrian and bicycle access to NIH, and the nearby shuttle bus routes, the Ride-on bus and Metro. Ms. Randall opined that the nearby road capacity would be adequate to serve the proposed development, in that the project can and does meet the local area review guidelines as well as the PAMR requirements. Technical Staff agreed, finding that PAMR could be met by the appropriate trip mitigation or a payment in lieu thereof. Exhibit 85, pp. 10-11.

Ms. Randall testified that there will be a significant reduction in trips because the students would live close to the NIH campus where they study and work and because of the automobile ownership experience that FAES has had at the two homes over the last five years, where reportedly only 30 percent of the NIH students living in those homes actually have had an automobile. 10/26/09 Tr. 202.<sup>17</sup> Ms. Randall reasoned that, with their employer being across the street, the need to own an automobile would be reduced.

While this prediction for NIH student automobile use may or may not be accurate, the Hearing Examiner must consider the impact of all possible uses for the subject site that are permitted under the requested zone because the binding elements do not exclude non-student use.<sup>18</sup> Ms. Randall's projections were not based on student use, *per se*, but rather on the trip generation rates found in the Local Area Transportation Review and Policy Area Mobility Review guidelines. These rates were derived from averages of actual traffic counts at townhouse subdivisions, and the number of occupants in each was not factored in. Even though Ms. Randall understood that the 31 townhouses would be occupied by students doing the majority of their work at NIH, she did not make the assumption in calculating trip generation that any of these individuals would necessarily be

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<sup>17</sup> The opposition challenged this assumption with testimony that the two houses on the site which are currently occupied by students each have two cars. One also has a moped. 10/30/09 Tr. 93.

<sup>18</sup> *Wheaton Moose Lodge v. Montgomery Co.*, 41 Md. App. 401, 418-420, 397 A.2d 250 (1979).



working at NIH. No reduction in the trip-generation projection was taken for a nearby work site. The Hearing Examiner is therefore satisfied that Ms. Randall's trip projections cover typical townhouse usage. Although Technical Staff raised the question of whether more trips would actually be generated by the proposed student use, Staff also answered its own question (Exhibit 85, pp. 10-11):

The Applicant's traffic statement analyzed the proposal as a typical residential townhouse development. . . .

If the residential land use is limited to the traffic generated by 31 typical townhouses, a traffic study is not required to satisfy Local Area Transportation Review (LATR) because the number of peak-hour vehicular trips is fewer than 30 peak-hour trips within the weekday morning and evening periods.

However, the applicant's proposal could be construed as a form of "group housing" for FAES students. Since five student rentals are proposed within each townhouse, the worst case scenario is that the development could generate up to five vehicular trips per townhouse (a total of 155 vehicular trips) if every student uses an automobile to get to class. Trip-generation data is not available for student "group housing" developments. However, the student residents should have no need to drive to the NIH campus because of the short walking distance to NIH and a shuttle that can pick-up residents near the proposed site.

Transportation Division of Technical Staff also noted that parking on the NIH campus is limited by an agreement between NIH and the County, and both the easy walking distance and nearby access to the NIH campus make it unnecessary for students to drive to the campus. The NIH perimeter shuttle is readily available, as well. Exhibit 85, Attachment 3, p. 3. Based on this evaluation and the evidence at the hearing that shuttle transportation is available both on the perimeter and within the NIH campus (10/26/09 Tr. 195-201), the Hearing Examiner finds that the likely peak-hour trip generation from the subject site would not exceed the figures proposed by Applicant and accepted by Technical Staff as satisfying LATR. Although the community expressed fears that considerable traffic would be generated on their local streets by the development, there is no evidence from which the Hearing Examiner can conclude that it would exceed road capacity or create significant inconvenience.

The Hearing Examiner asked Ms. Randall about the potential impact of the Base Realignment and Closure process (commonly referred to as "BRAC") on Cedar Lane traffic. She noted that

Bethesda is one of those locations where a lot of facilities will be brought in. It is her understanding that road improvements are proposed in connection with BRAC. One is for the intersection of Cedar and Old Georgetown, that is going to go through widening and changes in lane use, both along Cedar as well as on Old Georgetown. Route 355 and Cedar Lane will also go through modification and intersection improvements. She believes they are looking at the removal of the on-street parking that is currently permitted on Cedar Lane, and turning that lane into a travel lane.

If the parking lane is removed, there would be four travel lanes on Cedar. The County is hoping to see an increase in public transit usage, but Ms. Randall would expect the traffic volume to increase over time. Currently, the intersection at Route 355 and Cedar Lane is operating above the 1600 critical lane volume threshold, and it is therefore malfunctioning as an intersection.

Ms. Randall believes that this project would have a positive impact, in that the alternative of single-family, detached homes on this property would not necessarily be occupied by NIH workers or students. If those individuals have jobs elsewhere, the potential for automobile use would be greater than if the subject proposal is allowed.

Finally, the Hearing Examiner accepts Transportation Staff's finding that the proposed access to the site will be safe and adequate, and that the internal vehicular/pedestrian circulation and walkways provide for safe and adequate movement of pedestrian traffic. Exhibit 85, p. 10.

Based on this record, the Hearing Examiner finds that transportation facilities are adequate and will not be adversely affected by the proposed development.<sup>19</sup>

## 2. Utilities

Applicant's civil engineer, Seth Churchill, testified that water and sewer are available both in Cedar Lane and Cypress Avenue. All other utilities needed for a residential development (gas, telephone, electric) are also available along both frontages, and there is adequate capacity. 10/26/09

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<sup>19</sup> Issues regarding parking will be discussed in the section addressing neighborhood concerns.

Tr. 231-233.

Technical Staff stated in its report that the rezoning application and schematic development plan were reviewed by the Washington Suburban Sanitary Commission, and WSSC found that the reclassification from the R-60 Zone to the R-T 8 Zone and the subsequent proposed development would not burden the water or sewer systems of the area. Exhibit 85, p. 10.

Based on this evidence, the Hearing Examiner finds that the property will be served by adequate utilities and other services.

### 3. Schools

Technical Staff indicated that it had not received any comments from Montgomery County Public Schools regarding the proposal's potential impact on the school system. Staff added, "However, since the proposed use is solely for students associated with FAES, the proposal would not be expected to impact the public school system." Exhibit 85, pp. 11-12.

Because none of the binding elements restricts this use to "students associated with FAES," the Hearing Examiner must assume that, at some point in the future, the site could be used for typical townhomes permitted in the RT-8 Zone. Therefore, on December 10, 2009, he obtained a statement from Bruce H. Crispell, the Director of Long-range Planning for the Montgomery County Public Schools, projecting the number of public school students that could be expected from the proposed 31 dwelling units (Exhibit 144). According to Mr. Crispell, the subject site is served by the Walter Johnson cluster, which is not in moratorium under the Growth Policy school test. The 31 townhouses proposed would generate 7 elementary, 5 middle and 3 high school students.

The site feeds Wyngate Elementary School, North Bethesda Middle School and Walter Johnson High School. Mr. Crispell indicated that the Walter Johnson cluster has a number of capacity projects underway, or recently completed. The high school modernization was completed this year, and the school is within capacity. The North Bethesda Middle School is currently within

capacity, but enrollment is increasing and the school begins to be over capacity in 2014; however, the other middle school in the Walter Johnson cluster, Tilden Middle School, is well within capacity. The elementary school, Wyngate Elementary, has an addition programmed to open in August 2013. That will result in that school being within capacity, too.

Based on this record, the Hearing Examiner finds that there is sufficient school capacity for the proposed development.

## **I. Environment**

Technical Staff reports that a Natural Resources Inventory/Forest Conservation Plan (NRI/FSD) was approved on November 24, 2008 by Environmental staff (Exhibit 10). According to Staff, “[t]here are no sensitive environmental features on-site or nearby, such as streams, wetlands, floodplain and their associated environmental buffers.” Exhibit 85, Attachment 4. Technical Staff did not indicate that the property is within a Special Protection Area or a Primary Management Area. There also are no steep slopes or highly erodible soils on site. Stormwater management and forest conservation are discussed individually below.

### **1. Stormwater Management:**

Applicant’s expert in civil engineering, Seth Churchill, testified that although a proposed stormwater management concept plan was filed (Exhibit 15), it has not yet been approved because the exact implementation of new Maryland stormwater management laws, which go into effect in May of 2010, has not been determined by the County. Mr. Churchill is confident, however, that Applicant will meet the new laws. The stormwater management plan will be approved in concert with the preliminary plan.

In the existing condition, there are no stormwater management controls on the site; however, there are storm drain systems on both sides of the site’s high point. One system begins around

Acacia Avenue at Cypress, and the other is located at the corner of Cedar Lane and Cypress Avenue. Both of those systems were analyzed and found to be adequate to handle the proposed development.

To comply with the new law, Mr. Churchill proposes a variety of devices, including landscape infiltration, micro-biofiltration and porous pavements, most likely on the driveways and private sidewalk. According to Mr. Churchill, under the new system, quality and quantity controls are lumped together, and it is expected that there will be minimal or zero run-off. If that cannot be achieved, the requirements go back to the traditional calculations of quality and quantity, and the Applicant must provide a maximum of environment site devices to catch what cannot be treated inside the site with the traditional devices. In Mr. Churchill's opinion, when this comes to fruition, the stormwater management system that is installed will avoid run-off into the surrounding neighborhood, and it will do a better job than the current situation. For the typical storm, the vast majority of it will be directed towards the ground or stored and passed slowly into the ground rather than into adjacent developments and streets.

Based on this record, the Hearing Examiner finds that Applicant has at least demonstrated that a stormwater management plan can be employed for the proposed development which will not have adverse effects on the environment or the adjacent community, if approved at subdivision.

## 2. Forest Conservation:

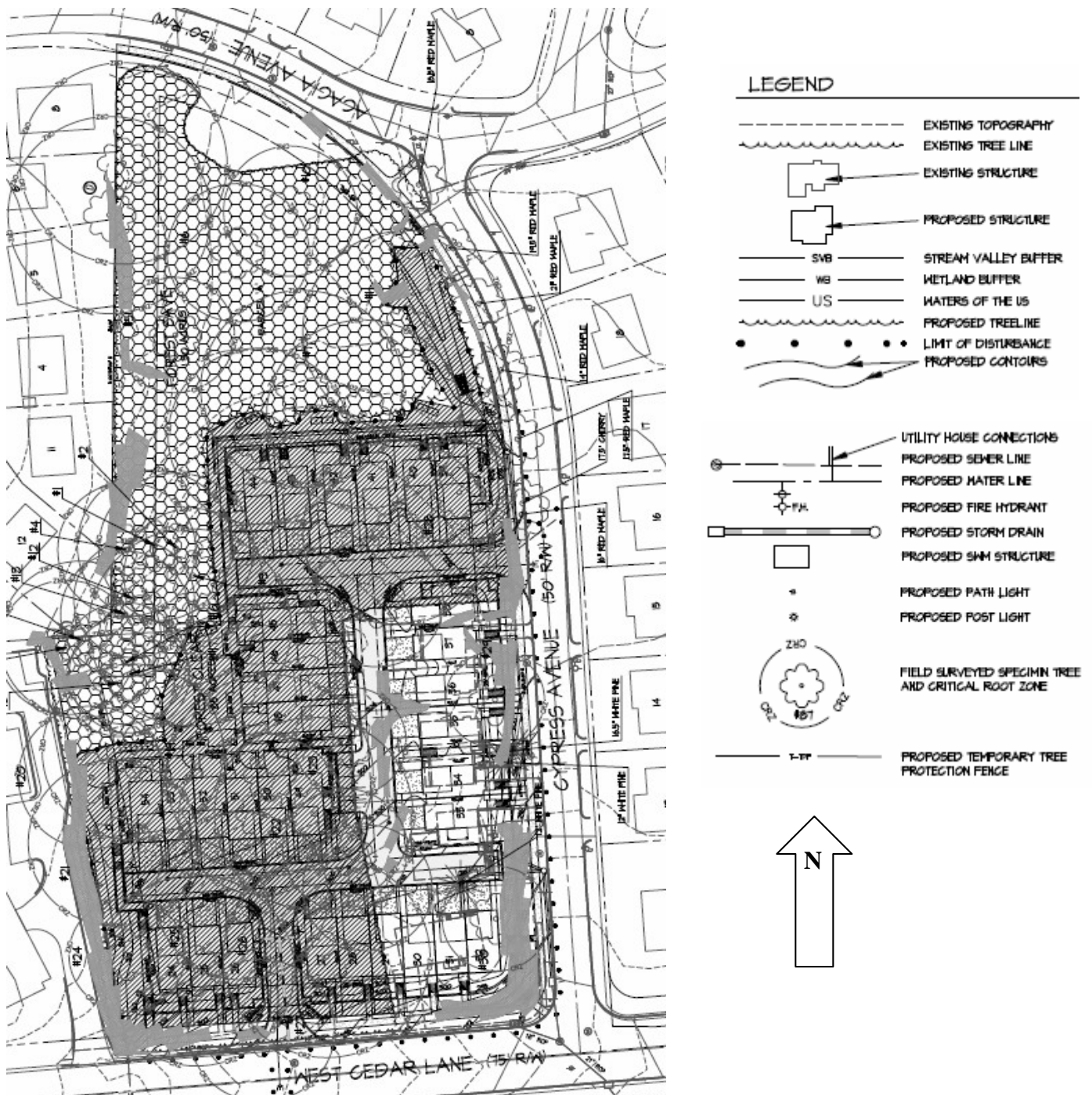
There are 3.15 acres of forest on site, including 10 significant and 20 specimen trees. One forest stand was identified and recommended as a priority for forest retention due to the number of specimen trees located there. Exhibit 85, p. 12.

The site is subject to Chapter 22A of the Montgomery County Forest Conservation Law. A preliminary forest conservation plan (PFCP) was filed as Exhibit 11, and it will be considered for approval in connection with subdivision. As noted by Technical Staff, the site's forest conservation requirement is shown to be met entirely with on-site retention of 1.30 acres of forest in Parcel A (*i.e.*,



on the north and northwestern part of the site). The site breaks even in terms of meeting forest conservation retention requirements, and does not require any forest replanting.

However, outside the 1.30 acres of saved forest, the proposal will result in the removal of most of the remaining significant and specimen trees (on the south and southeastern portion of the site), as can be seen on the following PFCP (Exhibit 11):



Technical Staff indicates that, at the time of forest conservation plan review, a tree save plan will be required to define the edge of disturbance and to save as many of the healthy specimen and significant trees as is feasible. Exhibit 85, p. 12.

Based on this record, the Hearing Examiner is satisfied that any environmental concerns on the subject site are being appropriately addressed.

### **J. Community Concerns and Compatibility-Density Considerations**

As discussed at the beginning of this report, thirty-one letters were received in support of the application (Exhibits 37, 38, 44, 47, 49, 55, 56, 59, 60, 62-64, 66-70, 72, 74, 78, 79 and 94) and forty-one in opposition (Exhibits 39-43, 45, 46, 53, 54, 57, 61, 71, 80-84, 86-88, 90-93, 95, 96, 98-103 and 105).<sup>20</sup> The pre-hearing opposition letters, led by the Maplewood Citizens Association (Exhibit 103), raised three main concerns – that the proposed use would be inconsistent with the master plan; would not be an appropriate transitional use; and would not be compatible with the neighborhood. Other opposition letters raised concerns about transient residents in a “dormitory” setting, as well as impacts on traffic, parking and property values (*e.g.*, Exhibit 46). Similar concerns were raised by the community witnesses who testified at the hearing, as summarized in Part IV.C. of this report.

Support for the application was based on the potential benefits to the community and the country from the young scholars who would reside at the subject site while working in NIH, and the desperate need for such housing near the NIH campus (*e.g.*, Exhibit 44).

Technical Staff summarized community concerns as follows (Exhibit 85, pp. 14-15):

Staff has received numerous letters both in support and opposition to the proposed rezoning. Virtually all letters supporting the proposal come from current students associated with FAES. These letters carry a common theme: the students have a need for housing that is close to NIH and the Bethesda CBD, offered on a short-term basis, and available at an affordable price.

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<sup>20</sup> The decision on a zoning application “is not a plebiscite.” *Rockville Fuel v. Board of Appeals*, 257 Md. 183, 192, 262 A.2d 499, 504 (1970). It is not the Hearing Examiner’s function to determine which position is more popular, but rather to assess the Applicant’s proposal against the specific criteria established by the Zoning Ordinance, and to evaluate compatibility and the public interest.

Staff met with residents of the Maplewood community at their request. During the meeting, community representatives voiced concern about a variety of issues regarding the rezoning proposal. The density of the proposed development was questioned and was said to be inconsistent with the established single-family character of the surrounding area. Residents also claimed that the proposal is more of a dormitory housing arrangement than a residential townhouse community. They wondered whether the applicant's proposal of having five students rent separate rooms on individual, staggered leases even meets the ordinance's definition of "family" since differing tenancy durations within the same townhouse may make for a transient, irregular group. Fears were also conveyed that the transient nature of student housing would be incompatible with the family-oriented character of the surrounding area and that the proposal would bring additional traffic and parking to the area. Finally, representatives stated that there is no need for a buffer from the NIH campus, as the part of NIH adjacent to the Maplewood community already consists of residential-appearing buildings buffered by trees and fencing. . . .

### **1. Inconsistency with the Master Plan:**

The issue of inconsistency with the *1990 Bethesda-Chevy Chase Master Plan* was discussed at some length in Part III.G. of this report. As stated in that section, the Hearing Examiner concludes that despite the ability of Applicant's proposal to fulfill some general goals of the Master Plan, such as providing affordable housing, it clearly is inconsistent with the explicit recommendations of the Master Plan for the site and for its surrounding area. The recommended Zone is R-60, not RT-8.

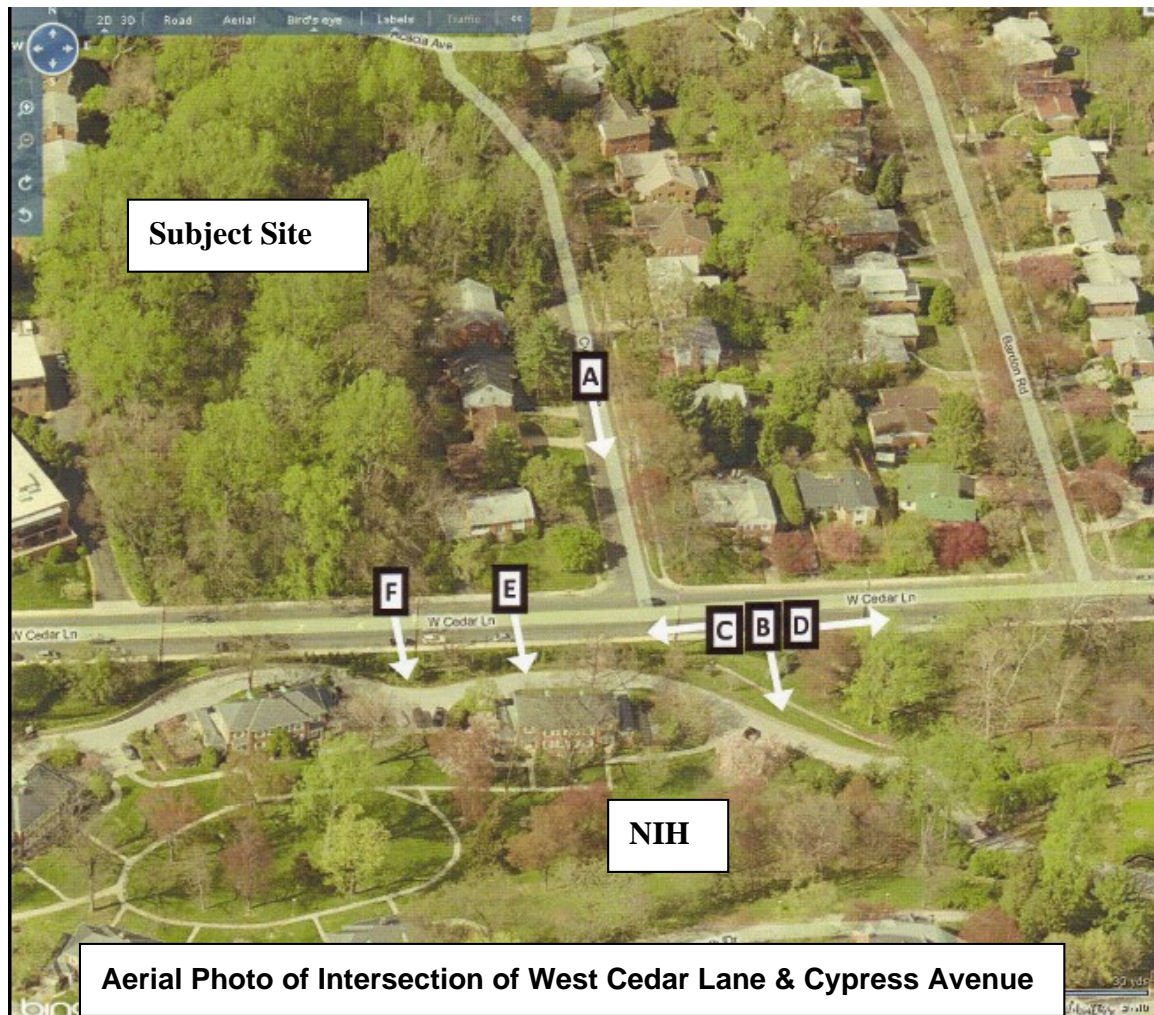
### **2. Whether the Proposed Use is Needed as a Transition:**

One of the major issues in this case is whether the proposed use is needed as a transition or buffer between NIH and the neighborhood to the north. This is a mixed legal and factual issue, which will be addressed in Part V of this report. Suffice it to say at this point that Applicant argues that the situation satisfies the statutory criteria to be a transition and is needed to buffer the community from NIH, while the members of the community produced evidence that there is no need for a buffer.

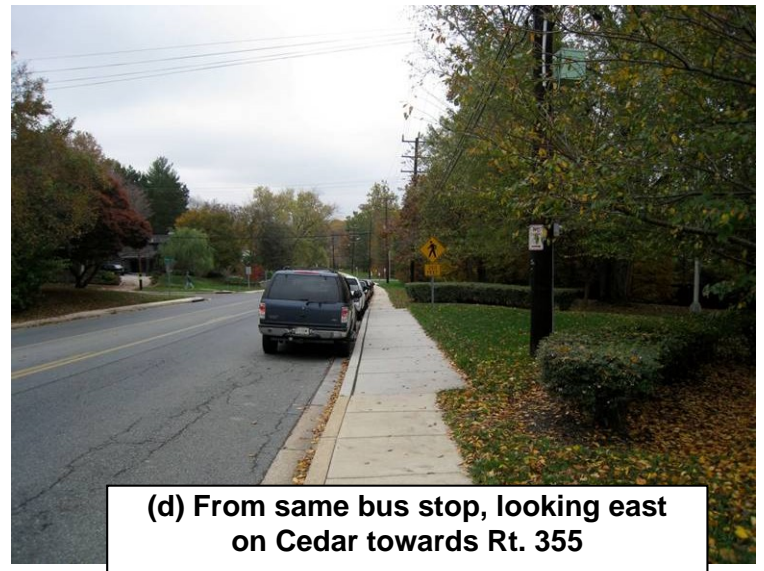
The community evidence in this regard consisted of testimony from the MCA that large buildings on the NIH campus were either not visible or did not visually impose upon their neighborhood (10/30/09 Tr. 196-197, 209-210, 230-231); the NIH Master Plan (Exhibit 133), which has numerous provisions that protect the community with adequate buffers internal to NIH; and



photos of NIH from the neighborhood (Exhibits 128(a) through (f)), purporting to show that NIH buildings are not visually intrusive from the north. Those photos are reproduced below, following an aerial photo (Exhibit 128) which provides a key to their location and direction:







Technical Staff's read on these issues and the Hearing Examiner's analysis regarding the transition issue will be discussed later in this report.

### **3. Compatibility and Density:**

Perhaps the biggest issue to the community is the feeling of local residents that the proposed townhouse use would not be compatible with the existing single-family, detached homes located on three sides of the subject site. Many of the nearby homes are "Cape Cods," and therefore would not be as tall as the proposed townhouses. 10/30/09 Tr. 167. Moreover, members of the community

characterize the proposed use as a student “dormitory,” which they feel would not fit in with the residential neighborhood, especially considering the “transient” nature of the proposed student occupants. 10/30/09 Tr. 98-99, 102, 110, 168 and 237. Finally, they argue that the proposed density is well above that of the surrounding community (10/30/09 Tr. 84, 97, 218, 244 and 248), and they express concern that the impact on adjacent neighbors would be even greater because Applicant proposes to concentrate all the townhouses on the southern end of the site. 10/26/09 Tr. 130-131 and 10/30/09 Tr. 166.

Applicant’s land planner, Kevin Foster, testified that townhouses are considered single-family houses and so, in a generic sense, they are compatible with other single-family houses. 10/26/09 Tr. 64. In his opinion, the proposed development would be compatible with the surrounding area. 10/26/09 Tr. 67.

When asked why this proposal isn’t actually one for a dormitory, Mr. Foster responded (10/26/09 Tr. 144):

I think when most people think about a dormitory they're thinking about a single room with a bed in it, shared bath facilities, you know, you eat at a cafeteria. That this is really a living, you know, a house unit. It's got a kitchen and it's got a living room. It has five bedrooms, five bathrooms. It's going to function very much like a house, not a dormitory. I went to college. I lived in a dormitory. That's not going to function as a dormitory.

Applicant’s architect, George Myers, testified that he had gone to great lengths to come up with a plan that responds to the existing streetscape and the existing houses. He believes that this is a good way to do infill, to increase density but maintain a certain architectural integrity in the neighborhood. In his opinion, the proposed rezoning application will not be detrimental from an architectural impact point of view on any of the existing houses or surrounding community. He feels this site is an appropriate place for this type of use and density, and it is compatible with the surrounding neighborhood. 10/26/09 Tr. 168.

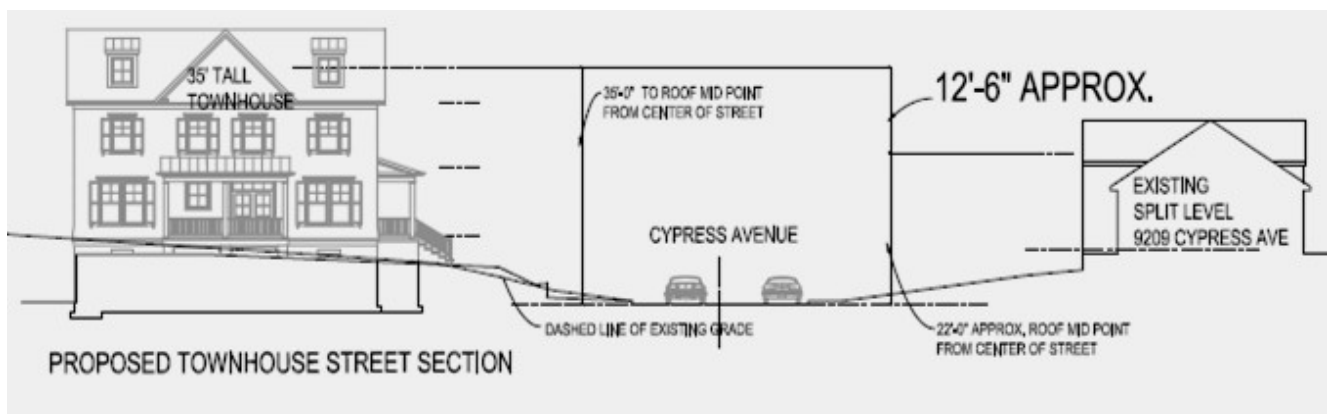
Technical Staff (Exhibit 85, pp. 18-19) and the Planning Board (Exhibit 97, p. 1) disagreed

with Applicant's experts, finding that the proposal would not be compatible. As stated by Staff:

The proposed townhouse community is not compatible with development in the surrounding area. A large portion of the surrounding area is comprised of existing single-family detached housing. Comparative density is an important factor in determining compatibility with adjacent properties. As this proposal will be more than double the prevailing density of the surrounding area, the proposed rezoning would constitute a serious intrusion into the residential community.

Further, the proposed townhomes are taller than the typical homes in the area and would be built at a higher elevation than the single-family houses to the east. Under these circumstances, there may be a subtle but noticeable difference in the respective height of the proposed townhomes and the existing homes in the area. Lastly, although the proposal is well designed, its compact nature may appear out of character with the single-family detached characteristics along the northern side of West Cedar Lane.

Mr. Foster replied that, in his opinion, the increase in density will be compatible with the surrounding area, and the fact that most of the proposed buildings would be in the southern half of the site did not mean that all of the internal units and all of the units along Cedar Lane would be piled up in front of the houses on Cypress Avenue. He stated that the units are designed to be compatible in massing. 10/26/09 Tr. 58 and 130-131. However, Applicant's own cross-section (Exhibit 120) appears to bear out the fears of the residents and the concerns of Technical Staff about the comparative heights of the existing homes and those of the proposed townhouses, which would be erected at a higher elevation than the nearby detached homes:

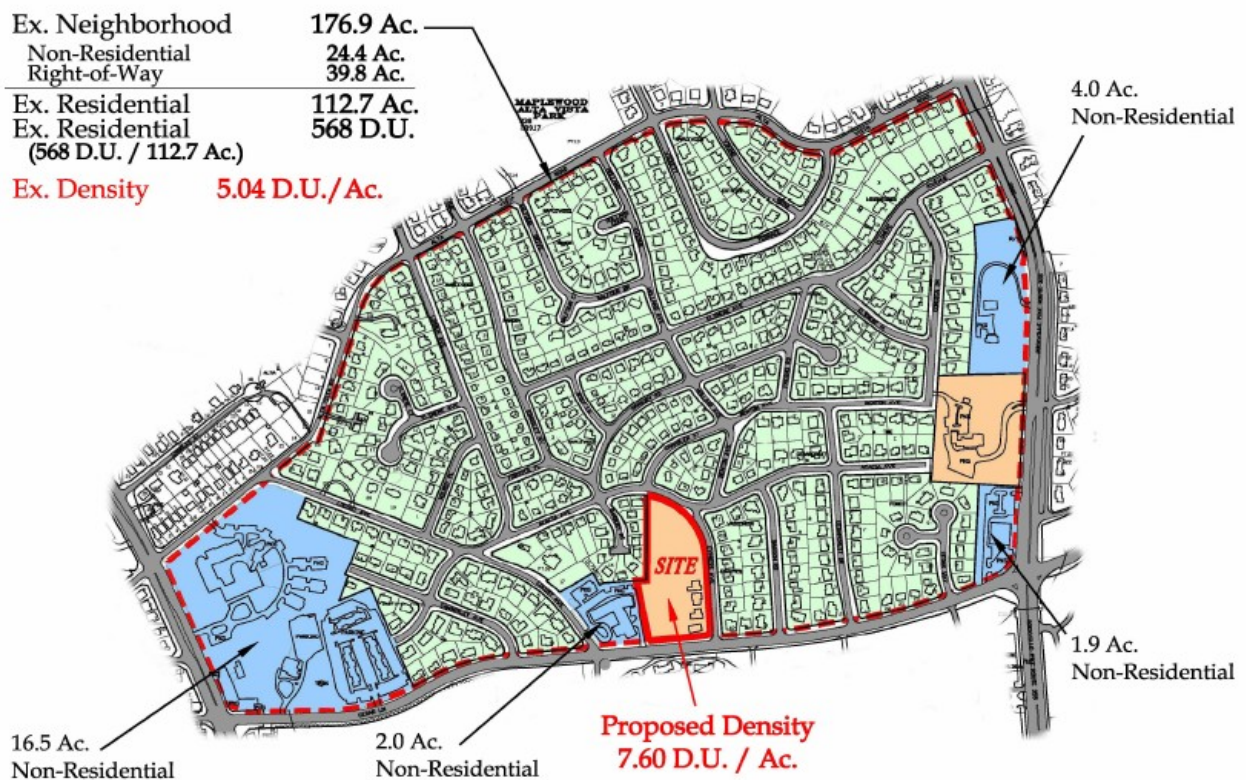


Moreover, Technical Staff specifically addressed the density issue, as follows (Ex. 85, p. 17):



... The existing density of the surrounding residential portions of the area equates to 3.69 dwelling units per acre. The existing density is substantially lower than then 7.6 units per acre proposed on the subject property. Further, the clustered design for the site will make the development appear even more dense than proposed and subject property's elevated topography may make the development appear imposing on nearby homes.

Applicant responded with an effort to show that the proposed density on the site will actually be closer to the existing density of the surrounding area than that which was estimated by Technical Staff. To do so, Applicant introduced a surrounding area map with density calculations (Exhibit 110).



Using Staff's surrounding area definition, but not including NIH (*i.e.*, the area encompassed by Cedar Lane, Md. 355, Alta Vista and Old Georgetown), Mr. Foster calculated that the R-60 zoned land area is 176.9 acres. Staff listed that area as 153.9 acres (Exhibit 85, p. 18) probably because it did not include nonresidential uses in its calculation. Mr. Foster opined that in calculating existing residential density in the area, Staff should have subtracted out from the 176.9 acres, not only non-residential uses

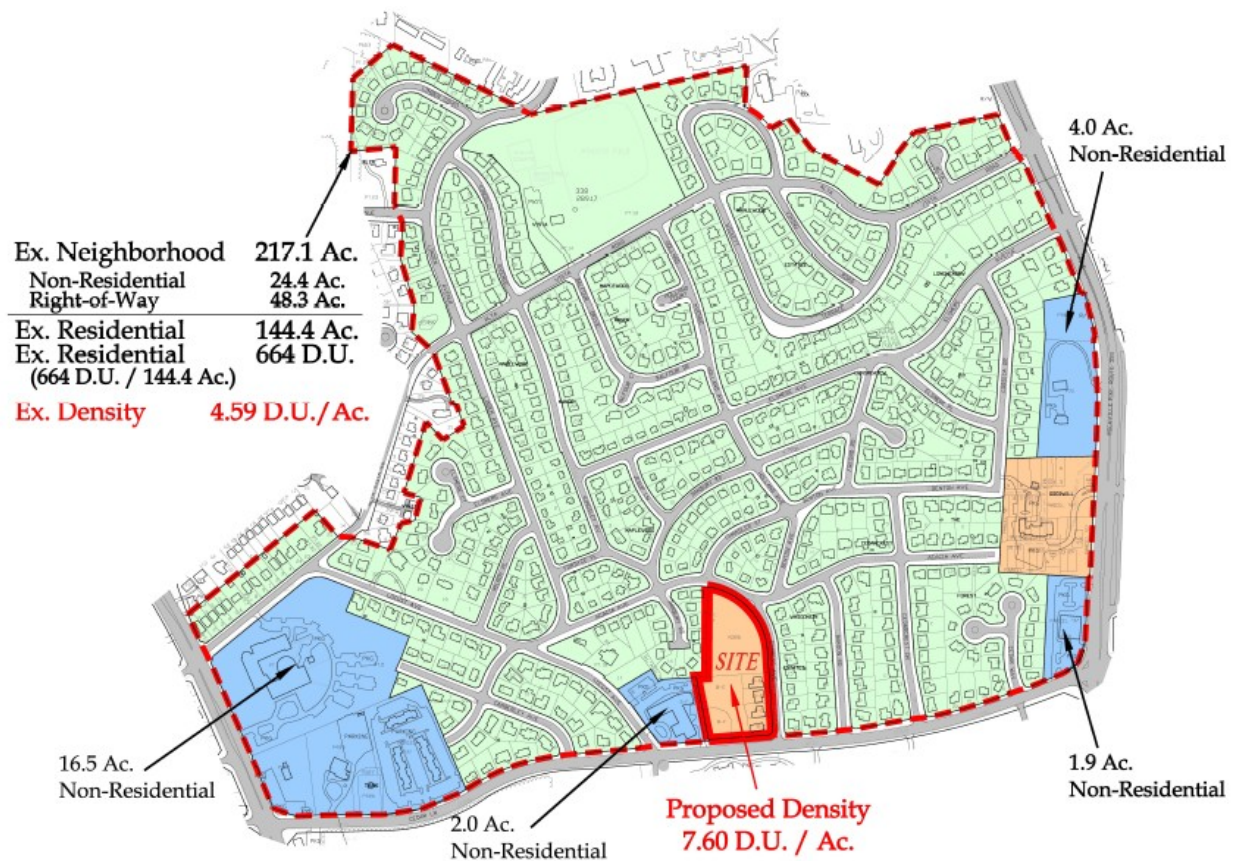
(24.4 acres) but also public rights-of-way (39.8 acres). That leaves an existing residential area of 112.7 acres. Dividing that into 568 existing dwelling units in the surrounding residential area yields an existing density of 5.04 dwelling units per acre. Staff's corresponding figure of existing density was 3.69 dwelling units per acre. Since the proposed density on the site would be 7.6 dwelling units per acre (31 d.u. / 4.08 acres), staff's calculation indicates the proposed on-site density would be twice the existing residential density; while Mr. Foster's calculation indicates that the proposed on-site density would be only 50% more than the existing residential density, not doubling the density.

On cross-examination, Mr. Foster indicated that some residents of the proposed development may use internal residential streets to access various major roadways. He also admitted that his calculation of the 7.6 dwelling unit per acre on-site density did not exclude streets internal to the site, nor green area, from the figure for residential area. The density would have been higher had he done so, but he did not because the streets internal to the development are private roadways. He opined that, in contrast, the density in the surrounding area should be calculated without including streets because those are public roadways. 10/26/09 Tr. 121-125.

While Mr. Foster may be correct in the calculation of density on site, thus bringing the proposed development within the 8 dwelling unit per acre maximum for the RT-8 Zone, the Hearing Examiner concludes that it is misleading to calculate density in the surrounding area as he does, by excluding public rights-of-way, because it distorts the density comparison between the subject site and the surrounding area. The effective or perceived density difference between the proposed development and the surrounding area will be much higher than his calculations would indicate because he has used a different standard for the two calculations, one including streets and one not.

From a compatibility standpoint, it makes no difference whether the streets are public or private. They are open spaces, and to exclude them from one measurement but not the other distorts the comparison. This distortion is heightened further if one considers on-site green area as part of the

total area for density calculations, but excludes green areas in the surrounding area from the surrounding area density calculation, as Applicant suggested in Exhibits 110 and 125(b). While Exhibit 125(a), submitted at the final hearing date, gets closer to portraying a fair picture because it includes the park area in the density calculation, it still has the deficiency of not counting roadways in the density calculation for surrounding area, while counting them for computing on-site density. Exhibit 125(a) is reproduced below:

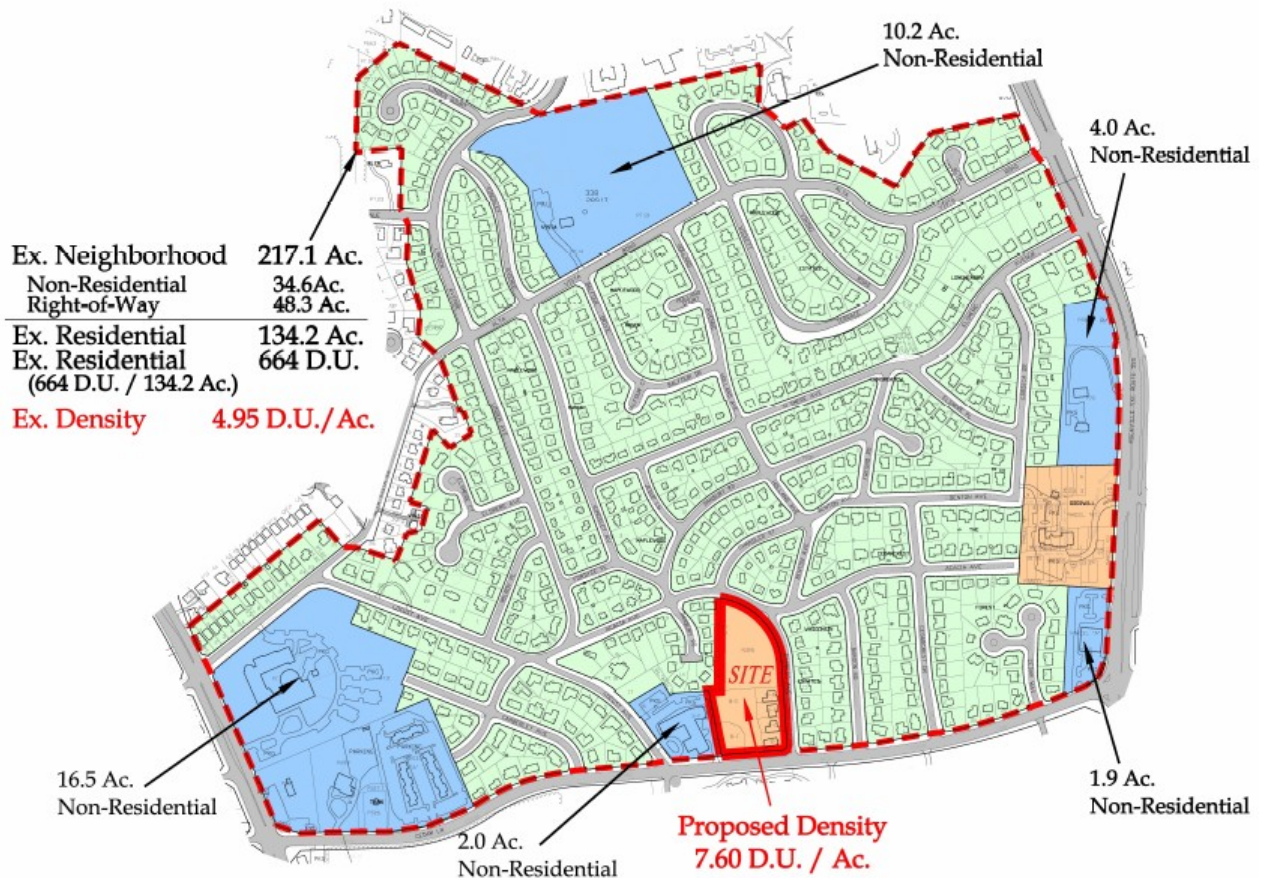


The Hearing Examiner therefore would utilize the area shown by Applicant in Exhibit 125(a), but like Staff, would also include the rights-of-way as part of the surrounding area for the comparative density calculation. Using Applicant's figures on Exhibit 125(a) for the number of acres in the total area (217.1) and subtracting out the non-residential area (Exhibit 24.4 acres), but not the area designated rights-of-way, the total residential surrounding area is 192.7 acres. Dividing that into



664 dwelling units yields a surrounding area residential density of 3.45 dwelling units per acre.

Exhibit 125(b) does not include the 10.2 acre park area as residential. It is reproduced below:



If one were to use the figures from Applicant's Exhibit 125(b), but allow the area of the rights-of way to be included, the total residential surrounding area would be 182.5 acres (*i.e.*, 217.1 acres total area – 34.6 acres nonresidential uses = 182.5 acres of residential use). Dividing that into 664 dwelling units yields a surrounding area residential density of 3.64 dwelling units per acre, which is almost identical to the 3.69 dwelling units per acre residential density calculated by Technical Staff for its smaller defined surrounding area.

The Hearing Examiner finds that it is either this figure (3.64 dwelling units per acre) or the one listed at the top of this page (3.45 dwelling units per acre) that is fair to compare with the

proposed on-site density of 7.6 dwelling units per acre, not the 5.04 dwelling units per acre density Applicant suggested in its Exhibit 110, nor the 4.59 and 4.95 dwelling units per acre densities it suggested in its Exhibits 125(a) and (b), respectively. Alternatively, Applicant could have excluded internal streets on the subject site from the calculation and then compared the on-site density to the surrounding area without counting the streets, but Applicant did not supply the figures for the on-site area without counting streets, so the Hearing Examiner could not make that comparison.<sup>21</sup>

Thus, the Hearing Examiner finds that both Technical Staff and the Planning Board were correct in finding that the proposed density (7.6 dwelling units per acre) is more than twice the residential density in the surrounding area (3.64 or 3.45 dwelling units per acre). It has been recognized in the case law that density is one of the most important factors influencing the character and lifestyle of a community, and therefore in determining compatibility. As stated in *Fitzgerald v. Montgomery County*, 37 Md. App. 148, 154, 376 A. 2d.1125, 1128 (1977), “Clearly, the character of a neighborhood and the quality and lifestyle conceived for it is determined by the density of the development.”

Given this record, including the density and effective height differentials discussed above, the Hearing Examiner concludes, as did Staff and the Planning Board, that the proposed development would not be physically compatible with the surrounding area.

Whether the proposed use would be incompatible because it will house students or transients is another question. While the Hearing Examiner understands the opposition’s expressed concern about having “transient” residents nearby, there is no evidence that the graduate students proposed for the subject site would pose any risk to the community. They would not be “transients” in the pejorative sense that word is sometimes used. As testified by Dr. Michael J. Lenardo, the director of a graduate program at NIH, the graduate students attending NIH are the “top tier” of graduate

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<sup>21</sup> Had Applicant done so, it is likely that the density of its proposed project would exceed the zone’s maximum of 8 dwelling units per acre.

students in the bio-medical field from around the country. 10/30/09 Tr. 259. They are thus hardly a security risk to the community.

Moreover, if the students living in these proposed units qualify as a “family” under the Zoning Ordinance, then it is questionable whether they could be legally considered incompatible with the neighborhood merely because they may be more transient than owners of single-family, detached homes.

Zoning Ordinance §59-A-2.1 defines a “family” as:

An individual or 2 or more persons related by blood or marriage, or a group of not more than 5 persons, excluding servants, not related by blood or marriage, living together as a single housekeeping group in a dwelling unit.

Applicant argues that a dwelling unit with five students living together satisfies this definition. It is conceded that the occupants of the proposed use would not, by and large, be related by blood or marriage, although there might be married couples living in some units. 10/26/09 Tr. 36-37. Thus, what is meant by the word, “family,” in the context of the subject case turns on what the Council meant by the phrase, “living together as a single housekeeping group.”

The applicable rule of statutory construction was set forth by the Maryland Court of Appeals in *Trembow v. Schonfeld*, 393 Md. 327, 336-337, 901 A.2d 825, 831 (2006),

Our goal is to ascertain and implement the legislative intent, and, if that intent is clear from the language of the statute, giving that language its plain and ordinary meaning, we need go no further. We do not stretch the language used by the Legislature in order to create an ambiguity where none would otherwise exist. If there is some ambiguity in the language of the statute, either inherently or in a particular application, we may then resort to other indicia to determine the likely legislative intent. [Citations omitted.]

In this case, there is ambiguity in the Council’s language, since the term “housekeeping group” is not defined in the Code, and it is susceptible of differing interpretations. The legislative history does not shed any light on what the Council meant by the phrase “living together as a single

housekeeping group,”<sup>22</sup> but there is case law which does provide some elucidation.

A recent decision by the Maryland Court of Appeals, *Armstrong et al. v. Mayor and City Council of Baltimore*, 410 Md. 426, 439, 979 A.2d 98 (July 23, 2009), discusses a similar issue in a non-student context. In *Armstrong*, the Baltimore City Board of Municipal and Zoning Appeals had affirmed a zoning administrator’s issuance of construction and occupancy permits for an apartment building containing twenty-six dwelling units, each of which was to be occupied by up to four unrelated tenants with separate leases. The issue before the Court of Appeals was whether the Board had properly interpreted the definition of “family” in the Baltimore City Zoning Code. That Code provides that a “dwelling unit” may be occupied by no more than one “family,” and the Baltimore Code defined “family” to include four unrelated individuals who live together, if they form a “single housekeeping unit.”

Relying on the New Jersey Supreme Court’s decision in *Borough of Glassboro v. Vallorosi*, 117 N.J. 421, 568 A.2d 888 (N.J. 1990), the Maryland Court of Appeals upheld the Board’s decision that the individuals could constitute a “family,” even though they had separate leases, because the evidence established that “they would be sharing normal household responsibilities such as cooking, cleaning and other related household duties.”

In the *Vallorosi* case, the Supreme Court of New Jersey affirmed a trial court’s finding that ten unrelated college students were a “single housekeeping unit.” As described by the Maryland Court of Appeals, 410 Md. at 452,

There, the parents of a college student purchased a house near campus in which they allowed their son and nine of his friends to live while attending school. *Vallorosi*, 568 A.2d at 890. The student roommates shared the common areas of the house, as well as a telephone line; they “often ate meals together in small groups, cooked for each other, and generally shared the household chores, grocery shopping, and yard

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<sup>22</sup> “There is no legislative history of the meaning of housekeeping unit. The Ordinance was enacted as submitted by the Planning Board.” Exhibit 140.



work.” *Id.* Like the tenants of Cresmont Loft, the roommates in *Vallorosi* had separate lease agreements with the landlord. *See id.* Each lease was for a term of four months (the length of a semester) and was renewable at the term's end. *Id.*

Since the Baltimore Code definition of “family” is similar to the Montgomery County Code definition, the court’s interpretation in *Armstrong*, and its reliance on *Vallorosi*, should control the evaluation of the term “family” in the case at bar. The Hearing Examiner therefore concludes that the fact that separate leases with FAES would be signed by each student does not *per se* exclude a group of students living in each dwelling unit from the definition of a “family;” however, there is insufficient evidence in this record for a determination to be made that the residents would be “sharing normal household responsibilities such as cooking, cleaning and other related household duties.” The fact that there would be a common kitchen and living room area supports the “single housekeeping unit” argument, while the fact that each bedroom would have its own bathroom probably militates against the single unit concept. The Hearing Examiner can and does conclude that the mere fact that Applicant proposes a student use does not, of itself, render the development incompatible.

Furthermore, if these units end up being occupied by traditional townhouse families, which is an outcome that must be considered possible by the Hearing Examiner in the absence of any binding elements prohibiting it, then the whole “dormitory-transient” issue disappears. In any event, the “dormitory-transient” issue is not determinative of the compatibility evaluation because the proposed development at the planned height and density is physically incompatible, as mentioned above, and because other considerations, such as traffic and parking, also affect the compatibility analysis.

#### **4. Traffic and Parking:**

The issue of traffic was discussed in Part III. H. of this report, where it was concluded that traffic from the proposed development would not put an undue burden on public transportation facilities. The probative evidence (*i.e.*, expert opinions from both Technical Staff and Anne Randall)

also supports a finding that traffic from the development would not create a compatibility problem with the community. Although the community expressed fears that considerable traffic would be generated on their local streets by the development, they produced no expert evidence in this regard. While Applicant's traffic expert admitted that some of the traffic from the proposed development may proceed through the local streets (10/30/09 Tr. 53-59),<sup>23</sup> there is no evidence from which the Hearing Examiner can conclude that a net increase in traffic flow in the peak hours of 11 trips in the morning and 21 in the evening, or a net increase in traffic during off-peak hours, would create significant compatibility problems.

Parking is a more difficult issue. The first question is how many parking spaces are actually being provided on site. Applicant counts stacked parking in the driveways as 62 additional parking spaces, while Technical Staff counts only the 62 garage spaces and the five visitor spaces, for a total of 67 spaces.<sup>24</sup> Exhibit 85, pp. 6., 11 and 14. Staff notes that even at 67 spaces, Applicant would be providing 5 spaces more than is required by the Zoning Ordinance for a typical R-T 8 zoning application. Nevertheless, given the proposed use of the townhomes and the potential number of students to be housed, Technical Staff expressed the concern that "the typical R-T 8 zoning standards may not be adequate to provide sufficient parking." Exhibit 85, p. 6. Staff added (Exhibit 85, p. 11),

Lastly, the residents and their visitors need to park their automobiles on the site without overflowing onto the adjacent residential streets. Without controls on automobile ownership by the student residents, up to five vehicles per townhouse plus visitors could be parking on-site, which would create an overflow situation requiring parking off-site on adjacent residential streets.

Staff suggested that if the rezoning is approved, a Traffic Mitigation Agreement should be entered into at subdivision review that includes measures to discourage student residents from owning

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<sup>23</sup> Common sense tells us that some of the traffic from the development would travel the local streets, especially with the anticipated difficulty in turning onto West Cedar Lane from the subject site during rush hours. 10/30/09 Tr. 213. However, this fact does not establish that traffic generated by this development would render it incompatible with the exiting neighborhood.

<sup>24</sup> Staff does acknowledge Applicant's position that there are additional stacked spaces in the driveways, indicating that the number of spaces adds up to 129, if the stacked driveway parking spaces are counted. Exhibit 85, p. 14.

an automobile and parking on the subject site.

This parking issue was addressed by both Applicant and the opposition at the hearing. Applicant produced testimony that fewer than 30% of the students housed in the four detached units on the site over the past five years had automobiles (10/26/09 Tr. 202), and that the proximity of their work at NIH would mean that many students would walk or bike to work, or take public transportation. 10/30/09 Tr. 53-55.

In Ms. Randall's opinion, there will be sufficient parking spaces provided on site, not just for this particular population, but for a traditional townhouse community. The Code requirement is two parking spaces per townhome, and Applicant is providing four (counting the stacked parking in the driveways), plus the five visitor parking spaces. 10/30/09 Tr. 47-48. Ms. Randall feels it is fair to count parking spaces stacked in the driveways as parking spaces on the site. 10/30/09 Tr. 71

The opposition produced testimony that each of two FAES homes currently occupied by students has two cars (10/30/09 Tr. 93), and that because there are no nearby stores or restaurants, they will all need cars to do the normal chores. 10/30/09 Tr. 110-113. Moreover, five guest spaces for a housing development of this size will not provide nearly enough parking to accommodate visitors. The fear is that to avoid the inconvenience of stacked parking, these students will park their cars on the narrow neighborhood streets. 10/30/09 Tr. 110-113. This problem will be exacerbated when a parking lane is removed from Cedar lane as part of the improvements to manage anticipated traffic generated by BRAC's upcoming major expansion at nearby Navy Medical. 10/30/09 Tr. 44.

The Hearing Examiner is persuaded by Technical Staff and the opposition that the planned parking will not be sufficient to avoid a large influx of additional student and guest parking on the neighborhood streets. This is more than a matter of compliance with the minimal parking requirements set forth in the Zoning Ordinance; it is a matter of compatibility with the neighborhood.

As mentioned earlier in this report, because the binding elements offered in this case limit

only the number of dwelling units and the number of MPDUs, the Hearing Examiner must consider the impacts of all possible uses which are permitted in the RT-8 Zone with the specified number of units and MPDUs. Applicant has argued that the Zoning Ordinance permits the use proposed – townhouses occupied by “families” of 5 unrelated students sharing housekeeping duties.

We must therefore assume that the use proposed by Applicant for student housing on this site is at least a possibility, and hence we must consider the potential impacts on available parking in the community if each of the 5 unrelated students brings a car. As recognized by Technical Staff, the proposed student use may well create an overflow of parking on the neighborhood streets. We have no way of knowing whether Applicant’s projection of less than 30% car ownership will apply to the proposed townhouse development, given the absence of nearby sources of food and the like. Moreover, stacking cars may not be practical for the use Applicant has proposed because students may not want to be bothered with juggling their cars when the expedient of local streets is available. Finally, five guest spaces for the entire development of 31 dwelling units is woefully inadequate.

Having considered the evidence produced by both sides and by Technical Staff, the Hearing Examiner finds that the application, with its proposed parking arrangement, would not yield a development compatible with the existing neighborhood.

## **5. Property Values:**

The final issue raised by the community is a fear that the proposed development would negatively affect their property values. The opposition produced two witnesses who discussed property values, Emmanuel Nwankwo, a local resident, and Chris Connors, an expert in real estate appraisals (who is also a local resident).

Mr. Nwankwo testified that appraisers told him the development, as planned, would have substantial impact and would affect his ability to sell his home. 10/30/09 Tr. 99-100, 104-105. As the Hearing Examiner noted at the hearing, this statement was hearsay, but it was not objected to. It was

therefore allowed at the hearing. Hearsay may be admitted in these administrative proceedings, but only if it is reliable. *Montgomery County Admin. Procedures Act, Sec. 2A-8(e)*. Nevertheless, given the nature of the hearsay (*i.e.*, the purported opinions of a unidentified experts, of unknown qualifications, who were not available for cross-examination), it will be given no weight by the Hearing Examiner, who finds that, in these circumstances, the expert opinion hearsay cannot be considered reliable.

Mr. Connors testified both as a concerned resident who lives in the neighborhood and as an expert in residential real estate appraisals. 10/30/09 Tr. 126-160. He is a certified appraiser in Maryland, D.C. and Virginia, and a senior residential appraiser with the Appraisal Institute.<sup>25</sup>

Mr. Connors stated that this sort of proposed development is inconsistent with and will have an adverse impact on the value of the properties in the neighborhood, his own as well as the ones adjoining it. He stated (10/30/09 Tr. 133),

In every assignment that I've had where single-family homes have been across the street from multi-family housing, albeit condominium or rental, it's an adverse condition beyond control of the homeowner. It's called external obsolescence. It creates a market-generated stigma associated. One hundred percent it will have . . . [a negative] impact on the value of the property and it can vary, I would say in this instance, maybe 5 to 10 percent . . .

Mr. Connors also opined that some of the internal designs of the proposed units are not consistent and compatible with a typical townhouse, and are thereby “functionally deficient.” 10/30/09 Tr. 134. He stated that, if these townhouses had to be resold, they would have trouble meeting acceptance in the marketplace because they are atypical.

Although the Hearing Examiner gives some weight to Mr. Connor’s expert opinion that the proximity of the proposed townhouses would adversely affect the property values of nearby single-family houses, the objectivity of his expert testimony was clearly affected by his stated desire, as a

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<sup>25</sup> According to Mr. Connors, all licensed appraisers are either certified or licensed. Licensed means you can appraise anything up to a million dollars in value. If you're certified, you can appraise anything, regardless of value or complexity.

neighboring homeowner, to defeat the subject application.<sup>26</sup> Moreover, his characterization of the proposed townhouses as “multi-family housing,” based on its proposed use to house students, is not consistent with the definition of townhouses in Zoning Ordinance §59-A-2, which specifies that they contain “one-family dwelling units,” not multi-family units. These circumstances have significantly reduced the weight that can be given to Mr. Connor’s testimony regarding the impact of the proposed townhouses upon nearby property values.

The Hearing Examiner also can give little weight to Mr. Connor’s testimony that the proposed townhouses would have diminished resale value as townhouses merely because they have features such as an extra bathroom and parking for four cars. When pressed by the Hearing Examiner as to why having an extra bathroom, five instead of four, would make the unit less valuable and not more valuable, Mr. Connors never came up with a satisfactory explanation. 10/30/09 Tr. 146-150. Mr. Connors insisted that he did not consider an extra bathroom to necessarily be better than the norm. Mr. Connors appeared to be basing his opinion of a diminished value on the use, not on the physical aspects of the property. Going floor by floor through the floor plan, it was only on the first floor that Mr. Connors found it very unusual to have a bedroom on the first floor adjacent to the kitchen.

Applicant’s architect, George Myers, testified that, in his expert opinion, the townhouses could be marketed to families, and they would still extract the greatest value in the marketplace. The extra bathroom is a positive feature, not a negative one. 10/26/09 Tr. 179.

On balance, the Hearing Examiner finds that the proposed townhouse units would be marketable to traditional families if they were not being used for individual students; however, that does not mean that these townhouses would not negatively impact the value of nearby detached homes. For the reasons already discussed in this report, the proposed townhouses would not be compatible with the nearby single-family, detached homes. It is therefore reasonable to conclude that

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<sup>26</sup> The Hearing Examiner bases this observation not merely on the fact that Mr. Connors lives in the neighborhood and strongly opposes the subject application, but also on his demeanor as a witness.



they may have some negative effect on the resale value of adjacent homes, as Mr. Connors testified.

Considering the entire record, the Hearing Examiner finds that the community has legitimate concerns about compatibility, density, consistency with the Master Plan, parking, and to a lesser extent, possible impacts on their property values.

#### **IV. SUMMARY OF HEARING**

The hearing began on October 26, 2009, but could not be completed on that date, and it therefore resumed on October 30, 2009. At the beginning of the hearing, the Hearing Examiner put the following disclosures on the record (10/26/09 Tr. 6):

1. That he lives a block or two from NIH; however, his home is south of the campus, and therefore not near Alta Vista or Maplewood; and
2. That his cousin's daughter-in-law is a doctor who is applying for a fellowship at NIH, among many other places.

The Hearing Examiner then asked the parties if they had any objections to his sitting on the case, in light of these disclosures. All parties indicated they had no objection. 10/26/09 Tr. 7.

Applicant called seven witnesses, Kimberly Baxter Decker, a graduate student studying at the NIH campus and co-chair of the graduate student council at NIH; Kevin Foster, a land planner; George Myers, an architect; Dr. Krishna Balakrishnan, FAES Executive Director; Seth Churchill, a civil engineer; Anne (Nancy) Randall, a traffic engineer; and Dr. Michael J. Lenardo, director of a graduate program at NIH.

The following community witnesses testified in opposition at the hearing: Allen Myers, as President of Maplewood Citizens Association (MCA); Tyler D. Mace, Esquire – individually and as co-chair of an MCA committee opposing the application; Christina Gorski McDermott; Emmanuel Nwankwo; Dan Pierce; Edward Stern; Annette Rothermel; Susan Cheney, co-chair of MCA's committee in opposition; and Chris Connors, an expert residential real estate appraisals.

### **A. Applicant's Case**

#### **1. Kimberly Baxter Decker, individually and as co-chair of the graduate student council at NIH (10/26/09 Tr. 22-43):**

Kimberly Baxter Decker testified that she lives in Silver Spring, and that she is in the graduate partnership program at the NIH (specifically in the Johns Hopkins University partnership). Ms. Decker is also the co-chair of the graduate student council at NIH, so she is representing that graduate student body. There are about 30 to 40 students that are active on the graduate student council.

The graduate program at the NIH is called the “graduate partnerships program” because NIH wanted to train graduate students on their campus but they do not have degree granting capability. So, they made partnerships with different universities around the country and also around the world to host graduate students on their campus in Bethesda, but the students would complete their course work at their home university. There are about 20 formal partnership programs. There are also a number of students that have individual partnerships to do their dissertation research at NIH.

Some students complete just a portion of their training at the NIH, so they may be there for four to six months. That would probably be the minimum length of time, but most students are at the NIH for the length of doing their dissertation, so that takes an average of five to six years.

FAES provides a number of support programs to graduate students at the NIH. For example, they take care of health insurance plans for the students and they also run a number of courses that many graduate students take to complete their course requirements or just to obtain some continuing education credits. Any student that is a resident at NIH is involved with FAES through both their health insurance and the continuing education process.

Currently, Ms. Decker commutes from Silver Spring to NIH either driving her car or taking the bus. During her time at NIH, she has also lived in an apartment building near the NIH campus. It's difficult to find quality affordable housing within walking distance to NIH. Due to the nature of their lab work, it's very important to be able to go back and forth to the lab, oftentimes, late at night or even

in the middle of the night.

Having affordable quality housing near campus would really help graduate students at the NIH and it would help not just in proximity and other tangible benefits, but also in building a graduate student community at the NIH. Ms. Decker noted that she did not mean “community” very much in the social sense, but rather that groups could get together to discuss their field of science over coffee on a Saturday morning, and that lasting links would be established allowing this cohesiveness to continue after leaving NIH .

There are about 500 NIH graduate students, but they are spread out all over the County and the District of Columbia and Northern Virginia in an effort to find an affordable place to live. About half are County residents. NIH used to maintain five or six apartment units (for about four students each) on Battery Lane near the campus, but no longer does so because of budget cuts. Students living in the two houses that FAES currently operates on Cypress Avenue might be there for about four years, with part of that time spent overseas. There is no other student housing maintained by NIH or FAES.

According to Ms. Decker, the graduate students are really eager to work with the Maplewood residents to make sure that the two communities can have a relationship from which both can benefit. Ms. Decker feels that the scholars community is a very responsible group of people, and she believes the students can be an integral part of the Maplewood community.

Ms. Decker thinks the plans might allow for one or two of the units to be modified so that two married couples could live in them instead of five individual students, and she would certainly support that kind of flexibility in the plans. It is very unlikely that there would be families with children in any of these homes. From what she understands, the rent would be about \$900 a month, per student. The benefit of the proposed townhomes is that they're furnished; they're very close to campus so students won't have any commute; and the intangible benefit of living with other graduate students is also valuable.

2. Kevin Foster (10/26/09 Tr. 43-151; 10/30/09 Tr. 7-13):

Kevin Foster testified as an expert in land planning. He described FAES's proposal for the property as calling for 31 townhouses to be located on the southeast portion of the subject property, and the northwestern portion of the property would remain in a wooded condition.

Mr. Foster used Exhibit 16 to define the surrounding area, as bordered on the east by Wisconsin Avenue (Rockville Pike MD 355); on the south by West Cedar Lane; on the west by Old Georgetown Road and on the north by the southern edge of the Pooks Hill multi-family area along the beltway and portions of Alta Vista Drive. Mr. Foster contrasted his definition with Technical Staff's definition shown in Exhibit 110, in which the northern border is Alta Vista Road, with the eastern and western borders the same as Mr. Foster's definition. Technical Staff also included a small part of the NIH campus within the southern border of the surrounding area, as shown on page 18 of the Staff report. Mr. Foster pointed out that he also considered NIH in evaluating compatibility as noted on Exhibit 16.

The biggest difference between Mr. Foster's definition of the surrounding area and staff's is on the northern end, where, as can be seen on Exhibit 19, Mr. Foster included an area of single-family detached homes and Maplewood Alta Vista Park, all north of Alta Vista Road, within the surrounding area, and Staff did not. Mr. Foster reasoned that those homes belonged in the single-family residential area surrounding the subject site more than in the multi-family residential area north of the park.

10/26/09 Tr. 47-52.

Mr. Foster testified that the majority of the surrounding uses are single-family, detached R-60 subdivisions which contain most of the surrounding area. There are several properties along the perimeter that contain other uses, American College of Cardiology along Old Georgetown Road; FAES; a social and academic center at the corner of Cedar and Old Georgetown; the Knights of Columbus; a medical office-townhouse community just to the east of that along Cedar Lane; the

Carriage Hill nursing facility directly adjacent to the west side of the subject property; the regional headquarters for the Boy Scouts of America, on the corner of Wisconsin and Cedar Lane; the Bethesda Crest townhouses north of that; and a church facility north of the townhouses. Though platted as “Alta Vista,” it is considered to be the “Maplewood” community.

Using Staff’s surrounding area definition, but not including NIH (*i.e.*, the area encompassed by Cedar Lane, Md. 355, Alta Vista and Old Georgetown) Mr. Foster calculated that the R-60 zoned land area is 176.9 acres. Staff listed that area as 153.9 acres [Exhibit 85, p. 18] probably because it did not include nonresidential uses in its calculation. Mr. Foster opined that in calculating existing residential density in the area, Staff should have subtracted out from the 176.9 acres, not only non-residential uses (24.4 acres) but also public rights-of-way (39.8 acres). That leaves an existing residential area of 112.7 acres. Dividing that into 568 existing dwelling units in the surrounding residential area yields an existing density of 5.04 dwelling units per acre. Staff’s corresponding figure of existing density was 3.69 dwelling units per acre.

Since the proposed density on the site would be 7.6 dwelling units per acre (31 d.u. / 4.08 acres), staff’s calculation indicates the proposed on-site density would be twice the existing residential density; while Mr. Foster’s calculation indicates that the proposed on-site density would be only 50% more than the existing residential density, not doubling the density.

Mr. Foster’s opinion is that the proposed increase in density would be compatible with the surrounding area, especially the way Applicant will be handling it on the specific site. Mr. Foster noted that townhouses are considered single-family houses and so, in a generic sense, they are compatible with other single-family houses.

Mr. Foster then used an aerial photo (Exhibit 109) to further describe the area, noting that the Bethesda Crest townhouses that are still under construction in the photograph. Otherwise it is current.

In Mr. Foster’s opinion, the proposed rezoning meets both statutory criteria in the purpose

clause of the R-T Zones. Though he does not contend that the site was designated for the R-T Zone in the Master Plan, he does urge that the subject property is located in a very appropriate location for residential development in the RT-8 zone. The subject property is within a 15 minute walk of a metro site at Medical Center. It is served directly by a bus line that serves three other metro sites and a regional shopping mall. And, it's across the street from one of the largest employers in the county. So, this would be a very appropriate location for medium density residential units that are developed in townhouse configuration. Due to this location, the subject property has the opportunity to also be a transitional or buffer use between the activities along Cedar Lane and the quasi-institutional commercial uses at NIH, and the lower density residential uses to the north. For the proposed rezoning, these townhouses will provide that transitional or buffer uses between the single families and Cedar Lane and NIH.

Mr. Foster noted that, in the past, in other cases, townhouse uses have been used for buffering roads or other uses from single-family subdivisions. He cited the case LMA G-858, the Montgomery College of Art and Design case, which allowed townhouses to serve as a buffer between Georgia Avenue and detached homes. There needs to be a demonstrated need for a buffer, but in other cases, what is actually required to necessitate a buffer has been not as specific as the requirements in the purpose clause of the zone.

Mr. Foster quoted from various pages of the Bethesda-Chevy Chase Master Plan (pp. 4, 5, 19 – 22, 25, 26, 29 and 51) in an effort to show that although the Plan did not designate the site for the RT-8 Zone, that zone would meet the goals and objectives of the Master Plan. He also put into evidence the excerpts from the Master Plan which he felt were relevant (Exhibit 115). He felt that Technical Staff relied exclusively on Table 5 from page 52 of the Master Plan. It contains the mid Bethesda land use and zoning recommendations for parcels M-1 and M-2, which are the two vacant parcels that are part of the subject property. That chart recommends the R-60 Zone for the site. Mr. Foster opined



that master plans need to be taken as a whole when analyzing the needs and goals and when looking at recommendations, especially since the master plan was written 20 years ago, and many things have changed.

When asked by the Hearing Examiner, Mr. Foster indicated that he was not familiar with State legislation that recently went into effect (*i.e.*, on July 2009) changing the interpretation of the words “consistent with” in master plan usage, as it had been analyzed in the *Terrapin Run* case. [The Hearing Examiner indicated he would give all parties time to file legal memos on the effect of the legislation before the record closed.]

In Foster’s opinion, the proposed development on the subject property will provide a unique use of scholar housing that is compatible with the existing housing not currently found in the surrounding area. The development will be of a density and a form that is compatible with the neighborhood and appropriate for the location. The high quality architectural style and pedestrian friendly streetscapes will enhance the community identity and quality of life in Bethesda.

Mr. Foster described the subject site and its immediate surroundings. On the southern or the lower portion of the exhibit is Cedar Lane, Cypress Avenue. The existing subject property contains four single-family detached dwellings which are located in the southeast corner of the subject property currently, access from Cypress Avenue. The northern and western portions of the subject property are currently wooded and are vacant. They previously had houses on them years ago that were since removed. The site itself on the northern portion of the subject property is relatively flat. It then drops off fairly dramatically going from north to south down to Cedar Lane. There is 10 to 15 feet of topographic change from the middle southern portion of the subject property down to Cedar Lane, and there is also a slope running west to east from the middle of the subject property over to Cypress Avenue. Cedar Lane in this location is sloping high on the west to low on the east end. So, it's sloping downhill in front of the subject property. Cypress Avenue has a high point in it about midway

along the subject property sloping in either direction down to Cedar Lane and down heading in the northern direction.

On the eastern side the western section or western side of the subject property is the Carriage Hill nursing facility. There are adjacent single-family houses to the northwest, north and eastern portion of the subject site. Across Cedar Lane are the buildings and roads within NIH.

Applicant's plan is to provide 31 single-family townhouses. They would be arranged in sticks that have traditional townhouses -- two traditional townhouse sticks along Cedar Lane with a single entrance point. The townhouses that face the open green on the northern portion of the subject property and the townhouses that face Cypress Avenue have been broken into duplex units so that they can reflect the massing and scale of the existing subdivision. This development was designed to be compatible with the existing surrounding neighborhood itself. There would be two traditional townhouse sticks, internal to the site, facing a village green that is backing toward the Carriage Hill nursing home. That little green area will be a recreation area, hopefully, for passive recreation, a sitting area. It will be used by the community. The remaining portion of the remaining open space to the north and northwest will be forest conservation and also portions of that will be left as open space for passive recreation, maybe some natural trails and sitting areas.

The binding elements listed on the schematic development plan (Exhibit 116) are a maximum of 31 units and a minimum of 12.5 percent MPDUs. The density proposed by Applicant is 7.6 dwelling units an acre.

Mr. Foster explained that in its initial SDP, Applicant listed the minimum required and proposed green area as 45% because that is what is required by Zoning Ordinance when the development includes MPDUs. When Technical Staff questioned that figure because Applicant was providing only the number of MPDUs required by law, Applicant wrote to the Planning Board clarifying that it intends to provide 67% green area, far greater than is required. Applicant contends

that Technical Staff based its recommendation of denial on an erroneous assumption regarding green area to be provided. The SDPs filed at the hearing as Exhibit 116 revised the green area figures, specifying that the required green area is 50%, and that a green area of 67% was being proposed. 10/26/09 Tr. 98-101. Applicant argues that this distinction applies to the minimum of green area required by Zoning Ordinance §59-C-1.74(d), but not to the maximum building coverage required by Zoning Ordinance §59-C-1.74(c), because the two sections have different language. [Nevertheless, the Hearing Examiner asked Applicant to produce a revised SDP that showed the proposed amount of building coverage.] 10/26/09 Tr. 108-111.

A revised SDP was therefore submitted at the second day of the hearing, specifying that Applicant proposed only 17% building coverage. Exhibit 124 and 10/30/09 Tr. 7-8.

Mr. Foster stated that, in his opinion, the subject property meets the purpose clauses of the RT-8 zone as both an appropriate location for townhouses with this density and as a transitional use; it complies with the development standards of the RT-8 zone; it is compatible with the density of the surrounding area and is compatible with the scale and design of the surrounding uses; it complies with the recommendations of the Master Plan notwithstanding the specific recommendation for this site; the proposed development would not be detrimental to the use, peaceful enjoyment or development of the surrounding properties or the neighborhood; there would not be any other adverse effects detrimental to the health, safety, security, and general well-being of the residents and visitors to this area; and the proposed local map amendment is compatible with the existing land uses in the surrounding area and is suitable and appropriate for the site and should be approved.

On cross-examination, Mr. Foster indicated that some residents of the proposed development may use internal residential streets to access various major roadways. He also admitted that his calculation of the 7.6 dwelling unit per acre on-site density did not exclude streets internal to the site nor green area from the figure for total area. The density would have been higher had he done so, but

he did not because the streets internal to the development are private roadways. He opined that the density in the surrounding area should be calculated without including streets because those are public roadways. Technical Staff and the Planning Board may have felt this made an unfair comparison of density, but Mr. Foster feels that his calculation of density was correct. 10/26/09 Tr. 121-125.

A similar issue was raised on cross-examination with regard to the proposed green area on site. Mr. Foster indicated that his on-site density calculation does not take into account the fact that at least 50 percent of the land on site is going to be environmental green space and all of the building density is going to be “shoved into the remaining 50 percent.” When asked whether that was inconsistent with his failure to include park space in the surrounding area into the density calculation, Mr. Foster repeatedly connected that to the question of whether the park green space was required, as was the on-site green space. Despite repeated efforts by the Hearing Examiner to get an answer as to why that made a difference when you are comparing densities for compatibility purposes, Mr. Foster was unable or unwilling to explain. 10/26/09 Tr. 125-129.

Mr. Foster opined that the fact that most of the proposed buildings would be in the southern half of the site did not mean that all of the internal units and all of the units along Cedar Lane are somehow piled up in front of the houses on Cypress Avenue. In fact, there are six houses along that frontage and there are five building masses facing it. He stated that they are designed to be compatible in massing.

When asked why this proposal isn't actually one for a dormitory, Mr. Foster responded (10/26/09 Tr. 144):

I think when most people think about a dormitory they're thinking about a single room with a bed in it, shared bath facilities, you know, you eat at a cafeteria. That this is really a living, you know, a house unit. It's got a kitchen and it's got a living room. It has five bedrooms, five bathrooms. It's going to function very much like a house, not a dormitory. I went to college. I lived in a dormitory. That's not going to function as a dormitory.

Mr. Foster testified about the Master Plan recommendation, on page 30, that townhouse use is recommended in areas of medium density or on larger sites that allow for transition to single family detached areas. He suggested that that language was related to the more relaxed MPDU requirement at the time the Master Plan was drafted. However, when asked by the Hearing Examiner, whether there was any evidence that connects the two, he answered "No." 10/26/09 Tr. 146-147.

On the second day of the hearing, Mr. Foster introduced a revised SDP showing a revised figure of 17% for building coverage. He also Introduced two new exhibits showing density calculation in his defined surrounding area, one including the park area to the north as part of the residential area (Exhibit 125(a)) and one excluding the park area to the north from that calculation (Exhibit 125(b)). Both exhibits still excluded public rights-of-way from the calculation. Exhibit 125(a) yielded a residential density of the surrounding area of 4.59 dwelling units per acre. Exhibit 125(b) yielded a residential density of the surrounding area of 4.95 dwelling units per acre. He noted that the proposed 7.6 dwelling units per acre would be only a 53% increase over 4.95 dwelling units per acre. 10/30/09 Tr. 7-13.

3. George Myers (10/26/09 Tr. 151-184):

George Myers testified as an expert in architecture. He opined that, from an architectural standpoint, the proposal for the subject site is suitable for the site and compatible with its surroundings. Using a floor plan of a typical unit (Exhibit 118), Mr. Myers described their design. The lower level has a rear entrance garage for two cars, stairs that go up, a bedroom and a bath suite. On the next floor is a common area which is a living/dining room/kitchen. There is also another bedroom and bath suite. On the next floor up are two bedrooms and two baths. In the attic, there is a single bedroom and bath. So, it essentially adds up to a common area, which is kitchen/living/dining room, and then five separate bedroom/bathroom suites. 10/26/09 Tr. 156-157.

So, essentially, they're really with very little modification we just made some internal changes to the townhouse to make it accommodate five adults versus a

family. But, also part of this was so that it would still work for a family as well.  
10/26/09 Tr. 158.

According to Mr. Myers, the only difference in these units from what he would sell as family townhouses is one extra full bath. He would characterize each unit as a single-family, attached residential unit.

Applicant will supply twice the parking required. There will be two internal garage spaces, two spaces in each driveway and five visitor spaces. The requirement would have been 62, and 129 spaces will be provided.

The project is laid out so there are two access points, two curb cuts, one on Cypress Avenue, about midpoint on the site frontage, and one on Cedar Lane, on the southern end of the site. There is an internal shared driveway. This will require fewer curb cuts than detached homes and is good from a planning standpoint.

Mr. Myers also introduced rendered elevations of the proposed development (Exhibit 119) and a cross section (Exhibit 120). He indicated that the footprint of the duplex units along Cypress Avenue would be similar to the footprint of detached homes across the street. Also, because of the slope of the street, at least at one point, the townhouse maximum height would be within a foot or so of the detached home maximum height. The massing of these units will be close in height to a typical R-60 new house that could be built there.

Mr. Myers testified that he had gone to great lengths to come up with a plan that responds to the existing streetscape and the existing houses. He believes that this is a good way to do infill, to increase density but maintain a certain architectural integrity in the neighborhood. In his opinion, the proposed rezoning application will not be detrimental from an architectural impact point of view on any of the existing or surrounding community or houses. This an appropriate place for this type of use and density, and it is compatible with the surrounding neighborhood.

In Mr. Myers' opinion, these units could be marketed to families and it would still extract the



greatest value out of them in the marketplace. The fact that the units will be smaller than some others is not an adverse point since the trend is smaller, not bigger today.

4. Dr. Krishna Balakrishnan (10/26/09 Tr. 184-227; 10/30/09 Tr. 34-35):

Dr. Krishna Balakrishnan testified that he has a Ph.D. in chemistry, and since 2006 he has been the executive director of FAES. His main duty at FAES as executive director is the overall administration and the daily management of the operation.

FAES was established in 1959. The main mission has been to provide services and programs for NIH that NIH couldn't administer on its own as a federal entity. At the time when FAES was founded, it was founded by a number of senior scientists who came from a number of different universities. And, they felt that it was very important to have an educational component. Even though NIH is a federal agency, they felt it was nice to have some sort of a mechanism by which courses can be taught in the evening.

So, the graduate school was set up at that time. The model that was used at that time was to use the senior scientists to teach courses, and many of the students who took the courses tended to be post doctorate fellows and graduate students and other people who are doing biomedical research. As the graduate school grew there was a need for establishing a scientific book store. So, that was established. In the '60s and '70s, the nature of NIH changed in the sense that more and more of the research was being done by younger people, and many of the young people were post doctorate fellows who come to NIH for between three and seven years. In the beginning, they were considered federal employees, but sometime in the mid '60s to mid '70s, that status was changed to visiting fellows. So, instead of being federal employees, they became independent contractors or fellows. At that point NIH approached FAES to see if it could develop a group health insurance program by which these fellows could be covered. NIH pays for the premium, but FAES administers the program.

FAES runs a number of other programs in the area of culture and arts and generally increasing the quality of life at NIH. There are two special programs that FAES has undertaken in the last six to seven years. One of them is the economic center, which is a remodeling of about 25,000 square feet within the NIH campus. The second is responding to the need of NIH scholars for close, affordable housing, and that resulted in this matter.

Dr. Balakrishnan further testified that if NIH is to be successful as a graduate program, it has to have some of the elements which universities have, one of which is to provide close affordable housing to the graduate students. He felt that the four acre lot in the corner of Cypress and Cedar would serve that purpose very well because of the proximity, and because it had a sufficient space to accommodate a number of students. He has had some experience with the four homes that FAES had there, two of which are being rented right now to students.

Dr. Balakrishnan's outreach to the surrounding community started more than three years ago, and he described it at some length. He believes this property is uniquely appropriate for the proposed use because it is adjacent to the campus and right next to a pedestrian and bicycle entrance on Cedar Lane. There is also another pedestrian entrance two minutes away and a perimeter shuttle that runs along Cedar Lane, past the subject site, down to Rockville Pike and the Metro station along Battery Lane and back to Old Georgetown Road. The perimeter shuttle goes from 6:30 in the morning to about 7:10 in the evening. It runs every 20 minutes and just makes a continuous loop. There is also an internal shuttle that runs inside NIH.

FAES will develop, build and maintain this development. The intent is to, first to all, accommodate as many graduate students as possible. If there are still vacant spaces, FAES will probably open it up to post doctorate fellows. There about 4,400 post doctorate fellows at NIH. If there are still vacant spaces, FAES will probably open it up to some of the visiting scientists who come to NIH and wish to rent close by.

Two of the four detached homes are currently rented out to about 10 graduate students sharing the homes. The leases typically run for one year at a time, although FAES tries to make the lease flexible enough so that if somebody wants to start in the middle of the year rather than the end of the year, it can be accommodated. Eight of the students have the one-year leases. The leases can be renewed, and it is possible that over a period of two or three years, a given resident may not see the same group for all two or three years. FAES may also rent out for periods as short as one month, but that is unusual. The amount of the rent for the new project is not yet determined. It will depend on costs. It may be \$900 or more or even less, depending on what the Board of Directors approves.

Of the renters who have been there over the last five years, less than 30 percent of the individuals had cars. Dr. Balakrishnan believes that the automobile ownership would really depend on where they live. If they live close to a metro station or if they live close to NIH, they probably would have much less of a tendency to own automobiles than if they live far away.

FAES cannot meet its objective to find affordable housing for the graduate students on any other property because the only other property that FAES has besides this is at the corner of Old Georgetown and Cedar, and that's a much smaller property.

On cross-examination, Dr. Balakrishnan testified that he had not asked NIH about establishing student housing on campus “[b]ecause that's not something we can have any effect on.” 10/26/09 Tr. 213. At the second hearing date, he noted that a very small percentage of the students may work at Bethesda Naval Hospital, across MD 355 from NIH, and not at NIH. 10/30/09 Tr. 34-35.

5. Seth Churchill (10/26/09 Tr. 227-240):

Seth Churchill testified as an expert in civil engineering. He provided the engineering support for the proposal. The main element of his analysis has to do with stormwater management.

Mr. Churchill described the topography. There is a high point along Cypress Avenue. Everything to the north drains to the north, and all the site areas to the south drain to the south

towards the intersection of Cedar and Cypress. All the roads around the site are relatively gently sloped, 4 to 5 percent. The grade runs along Cedar from west to east and then up Cypress it gets steep, so it is about 7 percent before the high point and then it crests and goes back down to about 7 percent. Onsite slopes are also relatively mild, getting up to a peak in about the 10 to 20 percent range.

There are storm drain systems on both sides of the high point. The existing system begins around Acacia Avenue at Cypress, and then there's an existing system at the corner of Cedar Lane and Cypress Avenue. Both of those systems were analyzed and found to be adequate to handle the proposed development.

In the existing condition, there are no stormwater management controls on the site. Water and sewer are available in Cedar Lane, and again on Cypress Avenue. All other utilities needed for a residential development are available - gas, telephone, electric along both frontages as well.

Mr. Churchill further testified that the site will comply with the newly enacted laws in the State of Maryland on stormwater management that will go into effect in May of 2010. He will be employing a variety of devices, including landscape infiltration, and micro-biofiltration. It will also include some use of porous pavements, most likely on the driveways and private sidewalks.

As part of this application, FAES would build a sidewalk on the entire frontage of its side (*i.e.*, the west side) of Cypress Avenue. All the site utilities are available and have adequate capacity, so, in Mr. Churchill's professional opinion, the subject property would be served with adequate public services and facilities. He does not know of any adverse effects that would be caused to either the use and enjoyment of the surrounding neighbors by the development of this property. From an engineering point of view, the facilities in the proposed improvements would be compatible with the surrounding facilities and improvements within the neighborhood.

According to Mr. Churchill, there is no approved stormwater management concept plan yet

because of the ever-changing nature of the exact implementation of the new laws, although he is confident, Applicant will meet the new laws. The stormwater management plan will be approved in concert with the preliminary plan.

Under the new system, quality and quantity are lumped into one large pool that you are expected to try and get into the ground with minimal or zero run-off. And, that will handle quality and quantity in the old system for all storms up to a one year event. If you are unable to achieve that (a significant portion of sites will not be able to because that is a lot of water to try and put into the ground in any subdivision), the requirements go back to the traditional calculations of quality and quantity, and you must provide a maximum of environment site devices inside the site to catch what you can't treat inside the site with the traditional devices. It is a complete shift in discussions of quality, quantity and specific volumes required and provided.

In Mr. Churchill's opinion, when this all comes to fruition, the stormwater management system that's installed will avoid run-off into the surrounding neighborhood. It will do a better job than the current situation. For the typical storm, the vast majority of it will be directed towards the ground or stored and passed slowly into the ground rather than into adjacent developments and streets.

[In response to the Hearing Examiner's question about potential impact on schools if the townhouses are built, Applicant's counsel pointed to Mr. Foster's statement on page 12 of his Land Use and Zoning report (Exhibit 21).]

6. Anne (Nancy) Randall (10/30/09 Tr. 13-79):

Anne (Nancy) Randall testified as an expert in traffic engineering and transportation planning. She explained LATR and PAMR. Under LATR, if the project would generate more than 30 trips, a full traffic impact study is required, and depending upon as the number of trips that are generated, the study area gets larger and larger. Local area review studies traffic impact on intersection capacity

using a critical lane volume standard. The critical lane volume threshold permitted in the Bethesda/Chevy Chase policy area is 1600.

For a project that generates between 3 and 30 trips, and the subject case is one of those, you do a trip generation analysis to show how many trips will be generated by the project based on the use.

In the policy area mobility review (PAMR), the staff sets a level at which any new project that comes forward must mitigate a certain percentage of the trips that will be generated by a project, any new trips, and that percentage of mitigation can range anywhere from zero percent to 100 percent.

In this particular case, for the Bethesda/Chevy Chase policy area, that mitigation requirement is 30 percent, so Applicant will be required, independent of anything required for the local area review study, to mitigate 30 percent of the new trips.

An Applicant does not necessarily mitigate trips at the site. Rather trips must mitigate traffic in general in the policy area. There are different ways in which the County and Park and Planning will accept mitigation. It may be through improvement of sidewalks, bike trails, bus shelters, pedestrian count-down signals, or other methods of facilitating the use of other means of transportation. One of the things that they have accepted is a payment in lieu, and that is \$11,000 per new trip that is being generated. Technical Staff must approve whatever methodology is employed to reach this 30 percent mitigation.

Ms. Randall testified that she prepared a letter and submitted it to staff on August 27th, 2008 (Exhibit 20) indicating that, based on Park and Planning trip generation rates for townhouses, the 31 townhomes will generate a total of 15 trips in the morning and 26 in the evening. Subtracting out the trips generated now by the existing single-family homes, there will be a net increase of 11 trips in the morning and 21 in the evening.<sup>27</sup> Applicant's PAMR mitigation responsibility, therefore, would be 30 percent of 21 PM trips because you always look to the higher trip number. That amounts to a

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<sup>27</sup> The Hearing Examiner notes that there is an arithmetic discrepancy in Ms. Randall's calculation, as discussed in footnote 16, on page 30 of this report.



mitigation requirement of 6 trips, according to Ms. Randall, which can be met by the payment of \$11,000 per trip. However, she believes that the reduction of trips at the site will probably be much higher because of the intended use by FAES, the proximity of the residents to their work site, the available pedestrian and bicycle access to NIH, the nearby shuttle bus routes, the Ride-on bus and Metro.

Ms. Randall analogized this situation to one she had studied in Arlington, Virginia. In Arlington, there was a 47 percent reduction and what you would typically expect to see in the way of trip generation from residential and office development because many transportation opportunities are available and employees live next to where they work. On cross-examination she admitted that there was an additional element in the Arlington example not present here – the Arlington residents also had nearby retail outlets.

The other reason that she believes there will be a tremendous reduction in trips is the automobile ownership experience that FAES has had at the two homes over the last five years, where only 30 percent of the students that have been living in those homes actually have an automobile. With their employer being across the street, the need to own an automobile is reduced and thus, there is a huge saving for those students in terms of their costs.

In Ms. Randall's opinion, the proposed development would meet significant goals of the Master Plan. Locating the students across the street from their place of study, tremendously reduces the need for these individuals to have to drive during the rush hours, which is the critical time through the policy area. She also felt that the single curb cut called for in the plans along Cypress Avenue would be superior to the current four curb cuts or the multiple additional cuts if the site were developed for detached homes, because it would reduce potential pedestrian conflicts with sidewalk and street traffic.

Ms. Randall opined that the nearby road capacity would be adequate to serve the proposed

development, in that the project can and does meet the local area review guidelines as well as the PAMR requirements. From a transportation point of view, the proposed development is in harmony with the general character of the surrounding neighborhood, and will not disturb the peaceful enjoyment of the area from a transportation point of view.

The Hearing Examiner asked Ms. Randall about the potential impact of the Base Realignment and Closure process (commonly referred to as "BRAC") on Cedar Lane traffic. She noted that Bethesda is one of those locations where a lot of facilities will be brought in. It is her understanding that road improvements are proposed in connection with BRAC. One is for the intersection of Cedar and Old Georgetown, that is going to go through widening and changes in lane use, both along Cedar as well as on Old Georgetown. And 355 and Cedar Lane will also go through modification and intersection improvements. She believes they are looking at the removal of the on-street parking that is currently permitted on Cedar Lane, and turning that lane into a travel lane.

If the parking lane is removed, there would be four travel lanes on Cedar. Ms. Randall would expect the traffic volume to increase over time. It's going to be staged as these employees come in, but they also have measures to improve the transit service. The County is hoping to see an increase in public transit usage. Currently, the intersection at Route 355 and Cedar Lane is operating above the 1600 critical lane volume threshold, and it is therefore malfunctioning as an intersection.

Ms. Randall believes that this project would have a positive impact in that if you were to build single-family homes on this property, those individuals would not necessarily have NIH as their employer or place of study. So the opportunity for those individuals to have jobs elsewhere, and have to get into their automobiles, potentially could be greater than if the subject proposal is allowed.

In her opinion, there will be sufficient parking spaces provided on site, not just for this particular population, but for a traditional townhouse community. The Code requirement is two parking spaces per townhome, and Applicant is providing four, plus the five visitor parking spaces.

Ms. Randall is not sure how many vehicles will be using the Cypress Avenue exit, rather than the Cedar Lane exit; it might be roughly half, but at most it would be 26 in the evening peak hour. She also does not know how many cars will proceed through neighborhood streets to the north, rather than using Cedar Lane to reach MD 355 or Old Georgetown Road. However, she feels that it is unlikely that these students would be doing that during the normal business day and during rush hour since their focus is going to be at NIH during those times and getting over to the campus, and their opportunity to do that is by walking, by bicycle or through public transportation. Therefore, Ms. Randall would expect this application to have a very limited impact on neighborhood traffic. Presumably, travel through those surrounding neighborhoods would add to the traffic in those neighborhoods, but the extent of it is not known. The nature of the proposed use (*i.e.*, student housing for NIH students) reduces the need for residents to use automobiles.

On cross-examination, Ms. Randall testified that the trip generation rates found in the local area transportation review and policy area mobility review guidelines are based on averages from actual traffic counts at townhouse subdivisions, and the number of occupants in each is not factored in. She also felt it would not matter if percentage of students owning cars were increased above the 30% figure suggested by Dr. Balakrishnan because just having a car doesn't mean it will be used.

Ms. Randall feels it is fair to count parking spaces stacked in the driveways as parking spaces on the site. She described Cyprus Avenue as a local residential street. If the property were developed in the normal way in the current R-60 zone, there would be multiple curb cuts.

Even though Ms. Randall understood that the 31 townhouses would be occupied by students doing the majority of their work at NIH, she did not make the assumption in calculating trip generation that any of these individuals would necessarily be working at NIH. No reduction in the trip-generation projection was taken for a nearby work site.

7. Dr. Michael J. Lenardo (10/30/09 Tr. 252-270), called as a Rebuttal Witness:

Dr. Michael J. Lenardo testified that he is a physician and research scientist. He is also the director of a graduate program at NIH which includes 95 graduate students. He does not live near NIH. At any given time, he usually has three to five graduate students in his laboratory. He currently has four such students working in his laboratory.

Dr. Lenardo has been familiar with the FAES organization for many years, but has no direct relationship with FAES. FAES provides support services for 450 to 550 student scholars at a given time. Dr. Lenardo gave some background on the student scholar program at NIH, which was expanded in an effort to disseminate the “huge amounts of medical knowledge” being developed at NIH and to encourage “an interdisciplinary approach to diseases.”

According to Dr. Lenardo, one of the most important issues facing the students is housing. Typically, a graduate student can spend between four and six years getting their doctorate, and the majority of that time is spent in the laboratory as opposed to class work, so that would occur on the NIH campus. FAES runs a bookstore; they run classes; they are facilitators as a nonprofit of educational programs at NIH, but they don't run his graduate program. His program is part of the NIH, and NIH attracts the top tier of graduate students from around the country.

The students are very devoted, spend long hours in the lab, and they've been hampered by the fact that they've not been able to live close to their work and have had to live all over the County. They desire to be close to the lab so they can walk across the street to work.

**B. The People's Counsel**

Martin Klauber, Esquire, the People's Counsel, did not call any witnesses; however, he expressed his opposition to the application. 10/30/09 Tr. 287-289.

It is the position of the Office of the People's Counsel that, to recommend that this requested reclassification be denied. The Office of the People's Counsel is in opposition.

A lot of sections of the master plan have been read to the Hearing Examiner, and I . . . would like to point the Hearing Examiner to the page 30 under the heading land uses, zoning recommendations for vacant and potentially re-developable parcels are among the most important recommendations of this master plan. . . .

[T]he the question is, why hasn't NIH provided on-campus housing? . . .

Contrary to the applicant's counsel, compatibility is not an ipso facto conclusion just because townhouses are being proposed. The pattern of development here is important to look at. The street on which these townhouses will look on are important. The driveways and the pattern of driveways is important. The pattern of parking in the neighborhood is important in determining whether this requested reclassification is compatible. It's not just the fact that townhouses are being proposed. It is how many, what they're going to do to the street, the amount of parking in each townhouse, aprosity [*sic*]<sup>28</sup> of visitor parking.

. . . [E]veryday demands . . . are going to take place if this requested reclassification is granted, and the implications and impacts of those demands become very important. Is this going to be an enclave unto itself that stands apart from the community, not just because of the pattern? . . .

If NIH had lived up to its responsibilities, we would not be here today. Plainly, it has not and so here we are, and I do believe that NIH bears the responsibility for addressing this problem, not the community. . . .

### **C. Community Response**

#### **1. Allen Myers, as President of Maplewood Citizens Association (10/30/09 Tr. 187-250):**

Allen Myers testified that he has lived about a block-and-a-half northeast of the subject site for about eight years and has lived in the general area for about 30 years. He is the President of the Maplewood Citizens Association, and he testified on its behalf, in opposition to the rezoning application.<sup>29</sup> In his opinion, the proposal is not compatible with the neighborhood, which is a single-family neighborhood without any large rental properties like the one proposed for the community. There are 950 homes in the neighborhood, and they are single-family detached housing.

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<sup>28</sup> The Hearing Examiner's recollection is that Mr. Klauber used the phrase "the paucity of visitor parking," but the court reporter apparently misunderstood him.

<sup>29</sup> Mr. Myers also served as president of the Bethesda Citizens Association and chair of its Zoning Committee. In addition, he served on the Western Montgomery County Citizens Advisory Board for seven years and on its Land Use Committee; he also chaired its Transportation Committee for several years. Simultaneously, he served for two years on the Sector Plan Advisory Committee for the Bethesda Central Business District.

In Mr. Myers' opinion, the proposal would not be consistent with the Bethesda-Chevy Chase Master Plan, which clearly says that the property is to be retained as R-60, as it does with regard to other large land uses at the intersection of Old Georgetown Road and West Cedar Lane. The subject property is in the mid-north BCC planning area of the Master Plan. The plan makes it very clear (pp. 51 and 52) there is no commercial property in the area, and that it is intended to keep the R-60 Zone throughout the planning area. The Plan's objectives include maintaining residential neighborhoods in the current zoning (pp. 1 and 3).

Mr. Myers also feels that a transition is not needed from NIH, because there is already a 250-foot buffer established by the NIH Master Plan that clearly is intended to buffer the community to the north. There is no requirement in the Bethesda/Chevy Chase Master Plan for additional buffering. Also, the NIH fence serves as a boundary to its expansion. Mr. Myers introduced the NIH Master Plan with its March 2005 Supplement (Exhibit 133), which states that one of its basic goals is to "Enhance and respect the stability and integrity of the surrounding residential community." (Page 7 of chapter 1, 4<sup>th</sup> bullet point). The same is said in Chapter 2, on page 13, regarding Goal 4. On page 14, there are sub-bullets that describe this goal. The first sub-bullet reads, "Conserve, enhance and increase the campus perimeter buffer zones, especially bordering the residential areas." The fourth sub-bullet reads, "Establish the scale and height of future NIH facilities so that they have no adverse impact on adjoining neighborhoods or other cultural resources." Following sub-bullets specify goals to "Minimize future construction near the adjoining residential neighborhoods, protect adjoining neighborhoods from intrusion of NIH traffic, parking, noise and intrusive lighting;" and "Endeavor to ensure that the NIH and its activities do not contribute to security or safety issues in adjoining neighborhoods."

Section 3.8.3 of the NIH Master Plan discusses its relationship to the local development plans. The fourth paragraph reads, "The NIH Master Plan 1003 update is compatible with the land use



recommendations of the Bethesda/Chevy Chase Master Plan. The plan neither requires nor applies pressure to change existing and future recommended land use and zoning. . . .”

Section 5.2.4, proposes that all buffer zones be maintained as extending 250 feet inward from the NIH property line. Figure 5.1.4(d) shows the 250-foot landscaped buffer zone on the north end of the campus, which will be maintained under the NIH Master Plan. On page 33 of chapter 5, the Plan specifies, ““To the north along West Cedar Lane, the predominantly residential quality of the NIH campus is compatible with the adjacent neighboring community, but it should be augmented with evergreen screening and ornamental plantings.” Permitted buildings heights are scaled down to zero at the northern fence. Given the NIH Master Plan and its actions to date, Mr. Myers sees no need for further transition suggested by Applicant. On cross-examination, he indicated that the 200 foot high clinical center can be seen from some parts of the neighborhood, but it is hard to see from the current site.

Mr. Myers further testified that his records indicate none of the residents in the four houses FAES owns have ever joined the civic association. On cross-examination, he indicated that he told Dr. Balakrishnan that FAES could not join the association because it is an organization. He was still considering whether he could join as the owner of four homes under MCA’s by-laws.

According to Mr. Myers, efforts to meet the transportation demands from BRAC are still a work in progress, and that it is likely with all the new patient visits, the intersection of West Cedar Land and MD 355 would ultimately continue to fail. He believes that most residents of the new project would choose to go out through the neighborhood because just getting out on West Cedar will be very difficult if the parking lane is removed.

He also thinks it is likely that the current SDP, which has an illustrative diagram of where dwelling units would be placed, would likely be changed because too many specimen trees would be lost on the southern end of the property if the plans go forward as shown.

Mr. Myers stated that the neighborhood has been stable, and there have been no changes in this area since the 1980s, with the exception of Bethesda Crest Townhouses, which were built as an optional method, R-60 townhouse development, along MD 355. He noted that the edges of residential communities that border nonresidential uses are always fragile. They can easily be destabilized by something such as this project. Because FAES is an NIH contractor, many Maplewood residents feel that NIH is extending its sphere of influence across West Cedar lane and wonder what's next. Mr. Myers stated that he has no bias against FAES or students. MCA is not opposed to students, but rather to transient residents, whether students or not. The neighborhood has no problem with FAES students living in it. Students are already living in the neighborhood, renting rooms and houses. The association would likely oppose any plan by a developer to put townhouses on this property if the density would adversely affect the neighborhood.

According to Mr. Myers, the neighborhood would support single-family detached housing even if more trees would be lost because it would be conforming with the existing zoning in the neighborhood; it would conform with the master plan; and it wouldn't be as disruptive to the community as a higher density townhouse development.

Mr. Myers indicated that units in Bethesda Crest are over 3,000 square feet in size and have three-and-a-half to four bathrooms in each unit.

2. Tyler D. Mace, Esquire – individually and as co-chair of an MCA committee opposing the application (10/30/09 Tr. 88-95):

Tyler Mace testified that he lives at 9205 Cypress Avenue, directly across from the two FAES properties that are rented (9204 and 9206 Cypress Avenue). He stated that at 9206, the occupants have a blue Hyundai and a white Camry. They both park in the driveway. At 9204, they have a black Honda that parks in the driveway, a silver BMW that parks in the street, presumably to provide both access, and a red moped that parks just off the driveway on the grass.

Mr. Mace also introduced an aerial photo of the subject site (Exhibit 128) and six ground level

photos (Exhibits 128(a) – (f)) keyed to the aerial photo. They depict views of Cypress Avenue, Cedar Lane and NIH from the immediate area.

3. Christina Gorski McDermott (10/30/09 Tr. 82-88):

Christina Gorski McDermott testified that she lives at 5202 Chandler Street, in a single-family home located north/northeast of the subject site, about a block away. She is a temporary contractor at NIH. She purchased her home in 2003 because she liked the single-family community existing there, and it is within one mile of the Metro that both she and her husband use. Neither drives to work.

Mrs. McDermott opposes the application. She testified that she is not against the development of the property, but believes it should be developed as single family homes, as is the rest of the community in that area, consistent with the master plan. She feels that such a dense development would be detrimental to the children walking to the bus stop, and using the streets, going to the playground. She does not believe that such a dense development would enhance pedestrian safety at all, with many more people owning vehicles and driving them around. She also does not believe that short-term student housing would in any way benefit the community.

4. Emmanuel Nwankwo (10/30/09 Tr. 95-108):

Emmanuel Nwankwo testified that he lives at 9207 Cypress Avenue. He works for Homeland Security as a police advisor and has been a foreign student. He is also an architect and a planner by profession, but he is testifying just as a resident and a concerned person who lives across the street from subject site. He opposes the application for several reasons.

Mr. Nwankwo agrees with the Planning Board that the proposal would not be compatible with the neighborhood. He is also concerned about security because many of the residents of the existing FAES housing on Cypress appear to be transients who have no longtime interest in the area, who have no investment interest in the area and apparently, do not care so much about the neighborhood.

Another issue is the economic impact on his property. Appraisers told him that if the

development were to take place as it was proposed, it will have substantial impact and it will affect his ability to sell the home. [The Hearing Examiner noted that this statement was hearsay, but it was not objected to, so it was admitted. Nevertheless, given the nature of the hearsay, it will be given only the weight it warrants, in the absence of the declarant.]

Finally Mr. Nwankwo believes the proposal is not in the public interest because it will undermine people's belief in the reliability of the county's master plans.

5. Dan Pierce (10/30/09 Tr. 108-114):

Dan Pierce testified that he lives at 5218 Danbury Road, where he has lived since 1995. Before that the house was rented out for a number of years. His home at the corner of Danbury and Acacia, two houses northwest of the property that FAES proposes to develop. Mr. Pierce opposes the application for many reasons, but he mentioned just one to avoid being duplicative. He is very concerned about the parking problem that will be caused by these "31 dormitory-like townhouses" where there are five bedrooms and five baths.

Unlike townhouses built for and occupied by a single family where one might typically expect just two cars, there will be five independent graduate students in each house. Graduate students are older, more established and more likely to own a car. While it's true that the students can walk from their townhouse dormitory to attend classes or go to work across the street at NIH, in this neighborhood, a car is necessary even just to get groceries. If there are five vehicles per townhouse plus the vehicles of visitors, there may be up to 150 or so vehicles. There are only five visitor spaces planned for the whole complex, and with numerous visitors, he would expect more than five visitors for 151 independent students.

People do not like to get up in the morning to move their cars, so he believes it's likely that many students will park on the street. This will create an overflow of resident parking, and Cypress Avenue would be dangerously crowded. The street is a narrow residential street. With cars parked

on both sides, it will not be possible for two cars to pass on the street. The situation will be even more dangerous on Acacia Avenue on the north side of the property, which is another place students and their visitors may park. Unlike Cypress Avenue, Acacia Avenue does not have sidewalks on either side. A parked-up street with no sidewalks is much more dangerous to walk on than if there are some spaces on the side of the road.

Mr. Pierce feels that the proposed plan is not only incompatible with the neighborhood, but will generate a dangerous parking problem and result in traffic hazards.

6. Edward Stern (10/30/09 Tr. 115-126):

Edward Stern testified that he lives at 9208 Bardon Road, about a half block to the east of the subject site. He is an economist and has lived in the neighborhood for 31 years. Mr. Stern opposes the application.

He noted that while he and his wife walk to the Metro, he still needs two cars to do errands and the like. It's a lovely neighborhood, but it is not a neighborhood from which one can walk to get services and retail or entertainment. So almost everyone has two cars to give them flexibility. The residents of the subject site will be adults living on their own, and they will need cars to go get the things that they need.

It also does not seem credible to Mr. Stern that cars are going to be stacked in the driveways because it is too inconvenient. He therefore would expect that these folks will park their cars not only on Cypress and on Acacia, but around the street in front of his house also. In addition, the idea of leaving just five parking spaces for guests where you have 155 people "doesn't meet the laugh test."

The proposed townhouses would fit in south of NIH where there are retail stores nearby, but not on the subject site. He believes they will change the feel of the neighborhood, towering over nearby homes, and create a continuing flow of strangers.

7. Annette Rothermel (10/30/09 Tr. 160-163):

Annette Rothermel testified that she lives at 5201 Chandler Street, due north of the project, about a block away. She is in opposition for three reasons. She bought in a very well-established neighborhood with the understanding that there wouldn't be a lot of development. She finds it frightening that an entity that has the financial means to do so can slowly be purchasing up homes in a very well-established neighborhood with the idea that once they were able to obtain a large enough contiguous property, that they would then try to re-zone it for something that suits their needs. The homeowners perceive it is going to be a negative influence and an encroachment into the neighborhood by NIH. It's a wedge into the neighborhood, and the zoning laws are here to protect the neighborhood from that.

Secondly, the neighborhood is developing a neighborhood watch in the community, and if you add 150 new residents that are here for potentially very varied lengths of time, two weeks, three months, or for years, it will be very difficult to know who really belongs in the neighborhood and who doesn't.

Finally, Ms. Rothermel feels that bringing together five students in a single home doesn't fit with at least the spirit of what it means to say five unrelated people living in a household is a family.

8. Susan Cheney (10/30/09 Tr. 163-187):

Susan Cheney testified that she lives at 5208 Chandler Street, at the corner of Chandler and Acacia, just north of subject site. She has lived there since 1982 and works both at the county's HOC and at Rockville Housing Enterprises, helping the residents there with their preparation for becoming first-time home buyers.

Ms. Cheney is opposed to the application because the master plan designates this as R-60, and that's something that the community has always regarded as a very important aspect regarding any possibility of future development to the subject site. This proposal is not R-60 single-family detached



dwellings. It's going to be a townhouse development in a very concentrated physical manner. And not only would the structures be concentrated, clustered, which would lead to a great deal of extra noise, but also, putting 155 unrelated adults in this location would impact traffic in the area. Also, the lifestyle of 155 single graduate students is very different from this family-oriented neighborhood.

Currently, the neighborhood is a suburban environment. There are homes with front yards and backyards and trees and gardens, and there are multi-age groups in the community. The proposed development would be totally incompatible and totally different from what exists in the neighborhood. She feels it would be inappropriate.

The four levels of a townhouse would surely loom over the surrounding houses directly across the street on Cypress. Ms. Cheney's property and her street are very different from this planned development. Her house was built in 1939 or 1940 and it's a Cape Cod, which is one-and-a-half stories tall. On the street, there are 12 homes and of those, eight are Cape Cods, one-and-a-half stories tall, which is totally different from this proposed development but very typical of the neighborhood. The remaining four properties are two-story homes.

The townhouses planned furthest to the north would be on a crest, and would be visible from her home, which is at a lower elevation. Unlike Applicant's drawings, the trees would not provide screening because they're tulip poplars, largely, and tulip poplars are not puffy on the lower level. They've got tall trunks and most of the branches are high up. And of course, in the wintertime, the leaves are all gone. She would see a string of dormitory townhouses and presumably a lot of lights and that sort of thing, especially in the wintertime.

Ms. Cheney testified about requirements for the rental charges in the area and introduced a HUD listing of FY 2010 fair market rentals for the metropolitan area (Exhibit 130) over Applicant's objection that it should be limited to the Bethesda area to have any application. She also introduced a description of income eligibility requirements for the County's MPDU program (Exhibit 131). [The

Hearing Examiner notes that the relevancy of these exhibits is questionable, and they have been given no weight in this report.] Based on presentations that were made to the community association by the FAES group, Ms. Cheney testified that each student would get a stipend of around \$27,000 per year. She concluded that since five students would be living in each unit, their income would be \$135,000 (5 X \$27,000) and would therefore exceed the MPDU maximum income levels.

9. Chris Connors (10/30/09 Tr. 126-160):

Chris Connors testified that he lives at 5004 Elsmere, approximately three blocks north of the subject parcel. He is a certified appraiser in Maryland, D.C. and Virginia, and a senior residential appraiser with the Appraisal Institute.<sup>30</sup> He testified as a concerned neighborhood resident and as an expert in residential real estate appraisals. Testifying to his observations as a nearby resident, Mr. Connors stated that he observed a resident of one of the existing FAES homes on Cypress Avenue drive his car up the curb and onto the grass to get around a car already parked in the driveway.

Testifying as an expert, Mr. Connors stated that this sort of proposed development is inconsistent with and will have an adverse impact on the value of the properties in the neighborhood, his own as well as the ones adjoining it. He stated (10/30/09 Tr. 133),

In every assignment that I've had where single-family homes have been across the street from multi-family housing, albeit condominium or rental, it's an adverse condition beyond control of the homeowner. It's called external obsolescence. It creates a market-generated stigma associated. One hundred percent it will have . . . [a negative] impact on the value of the property and it can vary, I would say in this instance, maybe 5 to 10 percent . . .

Mr. Connors also opined that some of the internal designs of the proposed units are not consistent and compatible with a typical townhouse, and are thereby functionally deficient. He stated that, if these had to be resold, they'd have trouble meeting acceptance in the marketplace because they are atypical. Since they're going to be rented to five different people, he doesn't know, from an

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<sup>30</sup> According to Mr. Connors, all licensed appraisers are either certified or licensed. Licensed means you can appraise anything up to a million dollars in value. If you're certified, you can appraise anything, regardless of value or complexity.

appraisal standpoint, how one could even appraise them because they don't fit under any required or existing zone under the master plan. The traffic impact will undoubtedly also affect the value of the property.

Historically, an appraiser uses other comparable properties to assess value, but this property has nothing to compare it to. The neighborhood is overwhelmingly R-60 detached housing, so it wouldn't be compatible. This site would be a hybrid of RT-8, but it's not really RT-8 because it doesn't follow RT-8 to the letter. There is no proof that such a design would gain acceptance if it were to be resold at any point in time. So it would be "a nightmare" for an appraiser to estimate the value of units in this development. Any properties that are adjacent to this would most likely suffer a 5 to 10 percent decrease in market value. 10/30/09 Tr. 137-138. He stated that the proposed townhouses would also be taller than others in the area, but later admitted that the maximum height of 35 feet specified in the schematic development plan is not unusual for townhouses. Mr. Connors felt that Bethesda Crest Townhomes are definitely greater in value. They have superior construction, and he believes they have 3½ to four bathrooms in each unit.

When asked by the Hearing Examiner what made the proposed structure of the townhouses atypical, Mr. Connors replied that you don't typically have a first floor bedroom in a townhouse of this design or a communal living area or five-and-a-half baths or parking for four cars. Your typical townhouse has two cars. The Hearing Examiner then asked whether any of those features would make it less desirable for sale if it were sold to a normal family, Mr. Connors replied that there's no proof that it would gain market acceptance because there's nothing to compare them to. The Hearing Examiner asked whether having an extra bathroom, five instead of four or three, would make it more or less valuable. Mr. Connors replied that it is whatever the market bears in any given marketplace, which changes from one neighborhood to the next. The typical home in Bethesda has two-and-a-half to three-and-a-half baths for a townhouse. According to Mr. Connors, you look at the surrounding

area and you decide whether it's marketable as such and whether it's the norm. If it's not, then it's functionally deficient and you would make a downward adjustment. When asked if there would be a downward adjustment if something were better than the norm, Mr. Connors insisted it would depend on the marketplace, and he did not consider an extra bathroom to necessarily be better than the norm. On cross-examination, however, Mr. Connors admitted that he was basing his opinion of a potential negative impact on value based upon the use, not on the physical property. Going floor by floor through the floor plan, it was only on the first floor that Mr. Connors found it very unusual to have a bedroom on the first floor adjacent to the kitchen.

On redirect, Mr. Connors stated that he was contemplating the proposed use when he characterized the proposed townhouse units as multi-family.

## **V. ZONING ISSUES**

Zoning involves two basic types of classifications, Euclidean zones and floating zones. The term “Euclidean” zoning arose from the seminal United States Supreme Court case upholding the land use authority of local governments, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Euclidean zoning divides the territory of a local jurisdiction into zoning districts with set boundaries and specific regulations governing aspects of land development, such as permitted uses, lot sizes, setbacks, and building height.

A floating zone is a more flexible device that allows a legislative body to establish a district for a particular category of land use, with regulations specific to that use, without attaching that district to particular pieces of property. Individual property owners may seek to have property reclassified to a floating zone by demonstrating to the Council that the proposed development will be consistent with the purpose and regulations of the proposed zone and compatible with the surrounding development, as required by the case law, *Aubinoe v. Lewis*, 250 Md. 645, 244 A.2d 879 (1967), and that it will be consistent with a coordinated and systematic development of the regional

district and in the public interest, as required by the *Regional District Act, Maryland-National Capital Park and Planning Commission Article (Art. 28), Md. Code Ann., § 7-110*.

Montgomery County has many floating zones, including the R-T Zones. The RT-8 Zone contains development standards and a post-zoning review process that generally delegate to the Planning Board the details of site specific issues such as building location, stormwater control, vehicular and pedestrian routes, landscaping and screening. The Council has a broader and more discretionary role in determining whether to approve a rezoning.

As mentioned in Part III.G. of this report (p. 25), compliance with recommendations of the Master Plan is not mandatory in this case because the R-T Zones do not require it; rather, the courts have held that the Master Plan should be treated as a guide in rezoning cases like this one.<sup>31</sup> The Master Plan is therefore discussed at length in Part III.G. of this report and considered in connection with the public interest analysis in Part V.C. of this report.

We return now to the three areas of Council review discussed above, the purpose and requirements of the zone, compatibility with land uses in the surrounding area, and relationship to the public interest.

#### **A. The Purpose and Requirements of the Zone**

The intent and purpose of the R-T Zones, as stated in Code §59-C-1.721, are set forth below.

*The purpose of the R-T Zone is to provide suitable sites for townhouses:*

- (a) *In sections of the County that are designated or appropriate for residential development at densities allowed in the R-T Zones; or*
- (b) *In locations in the County where there is a need for buffer or transitional*

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<sup>31</sup> Because the proposed RT-8 Zone does not require consistency with the Master Plan, this case is not controlled by the *Smart, Green, and Growing - Smart and Sustainable Growth Act of 2009*, effective July 1, 2009. Moreover, as discussed in f.n. 14 on page 25 of this report, the statute does not apply to rezoning applications because they do not constitute an “action” under the legislation.

*uses between commercial, industrial, or high-density apartment uses and low-density one-family uses.*

*It is the intent of the R-T Zones to provide the maximum amount of freedom possible in the design of townhouses and their grouping and layout within the areas classified in that zone, to provide in such developments the amenities normally associated with less dense zoning categories, to permit the greatest possible amount of freedom in types of ownership of townhouses and townhouse developments, to prevent detrimental effects to the use or development of adjacent properties in the neighborhood and to promote the health, safety, morals and welfare of the present and future inhabitants of the district and the County as a whole. The fact that an application for R-T zoning complies with all specific requirements and purposes set forth herein shall not be deemed to create a presumption that the resulting development would be compatible with surrounding land uses and, in itself shall not be sufficient to require the granting of the application.*

As is evident from the statutory language, the R-T Zone may be applied (1) in areas that are designated for R-T Zone densities (implying a master plan designation); (2) in areas that are appropriate for residential development at densities that are allowed in the R-T Zones; or (3) where there is a need for buffer or transitional uses.

It is undisputed in this case that the relevant Master Plan did not designate the subject site for the RT-8 Zone, and thus the Purpose Clause cannot be satisfied under that criterion.<sup>32</sup> However, there are three alternative methods of satisfying the Purpose Clause, and an Applicant is required to satisfy only one of them. Accordingly, the Purpose Clause may also be satisfied by development in areas “appropriate for residential development at densities allowed in the R-T Zones” or in areas “where there is a need for buffer or transitional uses between commercial, industrial, or high-density apartment uses and low-density one-family uses.”

Technical Staff determined that “the applicant has failed to establish any of the three alternative eligibility requirements.” Exhibit 85, p. 1. The Planning Board agreed with Technical Staff, stating (Exhibit 97, p. 1):

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<sup>32</sup> Both Applicant’s attorney and its land planner conceded that the Master Plan had not designated the subject site for the RT-8 Zone. 10/26/09 Tr. 18-19 and 73.

To obtain approval for the R-T 8 zone, an applicant must show that the site is either designated for the zone in the relevant master plan, there is a need for a transition at the proposed location, or that the proposal is appropriate given the location and density sought. The Planning Board agreed with staff that the G-882 application failed to establish any of the three alternative eligibility requirements. The site is not designated in the Bethesda-Chevy Chase Master Plan as suitable for the R-T 8 zone as the Plan reconfirms R-60 zoning on the site and recommends single-family detached housing. The site does not qualify as an appropriate transition and the proposed density is not compatible with the prevailing density of the surrounding area. For these reasons, the Planning Board does not believe that the R-T 8 zone is appropriate at this location.

Applicant argues that the subject site satisfies both the “appropriateness” and the “transitional” criteria. 10/26/09 Tr. 67-68. We turn first to the question of whether a transition from a use such as NIH can be held to satisfy the transition language in the purpose clause, given that NIH is an institutional use, and not, strictly speaking, a “*commercial, industrial, or high-density apartment use[]*,” as specified in the Zoning Ordinance.

Applicant points out that the same language has been used in at least one other re-zoning case (G-858) to justify transition from a highway use. Exhibit 114. Technical Staff and the opposition, on the other hand, cite re-zoning case G-834 for the proposition that we must be bound by the specific language of the ordinance, which lists only commercial, industrial, or high density apartment uses as being appropriate for a transition; otherwise, “it would subject future applications of the R-T zone to subjective and undefined notions based on perceptions of adjacent properties.” Exhibit 85, p. 17, and Exhibit 161.

The goal of statutory construction “is to ascertain and implement the legislative intent . . .” *Trembow v. Schonfeld*, 393 Md. 327, 336-337, 901 A.2d 825, 831 (2006). As stated in that decision,

Our goal is to ascertain and implement the legislative intent, and, if that intent is clear from the language of the statute, giving that language its plain and ordinary meaning, we need go no further. We do not stretch the language used by the Legislature in order to create an ambiguity where none would otherwise exist. If there is some ambiguity in the language of the statute, either inherently or in a particular application, we may then resort to other indicia to determine the likely legislative intent.” *Id.*

But this standard must be considered in light of the following language from *Maryland-National Capital Park and Planning Commission v. Anderson*, 164 Md. App. 540, 569-570, 884 A.2d 157, 174 (2005), *aff'd* on appeal, 395 Md. 172 (2006):

Even under the plain meaning rule, however, we do not ignore the Legislature's purpose if it is readily known. *State v. Pagano*, 341 Md. 129, 133, 669 A.2d 1339 (1996). In this regard, “we may ... consider the particular problem or problems the legislature was addressing, and the objectives it sought to attain.” *Sinai Hosp. of Baltimore, Inc. v. Department of Employment & Training*, 309 Md. 28, 40, 522 A.2d 382 (1987); see also *Romm v. Flax*, 340 Md. 690, 693, 668 A.2d 1 (1995).

It is arguable in this instance whether there is any ambiguity in the language. The Council was quite specific in listing three uses, “*commercial, industrial, or high-density apartment uses,*” and not others. On the other hand, there does not seem to be a logical reason to have excluded large institutional uses, such as hospitals, from this listing,<sup>33</sup> leading one to believe that the Council may have intended the three listed uses as examples of intense uses, rather than as the sole justification for a buffer or transition. “To effectuate the Legislature’s intent, we may consider ‘the consequences resulting from one meaning rather than another, and adopt that construction which avoids an illogical or unreasonable result...’”. *Maryland-National Capital Park and Planning Commission v. Anderson*, *supra*, 164 Md. App. at 570, 884 A.2d at 174-175 (2005).

In an effort to determine the Council’s purpose, the Hearing Examiner examined the legislative history of the language in question,<sup>34</sup> and hereby takes official notice thereof.<sup>35</sup> Zoning Ordinance §59-C-1.721(b) provides that an R-T Zone may be permitted, *inter alia*,

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<sup>33</sup> The opposition suggests that institutions were likely excluded from the list in the “buffer-transition” clause because there are so many of them throughout the County and many are small (Exhibit 161); however, the Hearing Examiner does not believe that this conclusion is justified because adding institutional uses to the listing would not mean that every institutional use would justify application of the buffer-transition clause. There would still have to be a demonstrated need for the buffer or transition, and a small institutional use would not meet that criterion.

<sup>34</sup> The Hearing Examiner thanks Council attorney Jeff Zyontz, Damon Orobona of Technical Staff and the Council’s legislative services for their assistance in this regard.

<sup>35</sup> The legislative history is contained in Exhibits 150 through 155. The Hearing Examiner summarized it for the parties (Exhibit 156), and gave them the opportunity for comment. Exhibits 157 and 158. They did so, and their comments have been included in the record as Exhibits 159 – 161.



*In locations in the County where there is a need for buffer or transitional uses between commercial, industrial, or high-density apartment uses and low-density one-family uses.*

The quoted language was first enacted into the Zoning Ordinance on September 1, 1970, by Ordinance No. 6-206 (Exhibit 150), which repealed prior language of the purpose clause and substituted the present language.<sup>36</sup> This language was supported by the Planning Board and its Technical Staff in a memorandum to the Council dated July 23, 1970 (Exhibit 151). That memorandum noted, “1. The ‘Purpose’ section now clearly states that the zone can be used as a transitional use,” but did not discuss the meaning of the language any further.

The language was also supported by an “Ad Hoc Committee on Town House Zone,” in a report dated June 19, 1970 (Exhibit 152), which did little on this point but quote the language and state that it was carried over into the committee’s draft. The “ad hoc committee” had been created by the Council in Resolution No. 6-2798, dated April 14, 1970 (Exhibit 153), to review the record of the hearing on Zoning Applications F-509 and F-510, which addressed proposed text amendments to the R-T Zone.

The hearing referenced in Resolution No. 6-2798 took place on February 25, 1970, but contained almost no discussion of the language in question. One witness (Mr. Simpson, at p. 61, Ex. 154), however, mentioned that the language was derived from the “opinion of November 12, 1963.”

The “opinion of November 12, 1963” turned out to be Ordinance No. 5-32, dated November 12, 1963 (Exhibit 155). That Ordinance had amended the Zoning Ordinance with regard to the R-T Zone, but did not add the language in question to the Zoning Ordinance, itself. Rather, it stated the following in the first paragraph of the “Opinion” portion of Ordinance No. 5-32:

This application . . . proposes an amendment to the Zoning Ordinance Text which would add a new section thereto allowing for town houses as a permitted use. It

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<sup>36</sup> There have been some changes since then to the purpose clause, but not to the language in question (except for the seemingly meaningless substitution of the phrase “one-family uses” for the phrase “single family uses”).

was the belief of the Applicant and those testifying in support of the application that, in general, this additional category would permit a transient zone between commercial, industrial, and high-density apartment zones and low density single family zones. . . . [Emphasis added.]

Thus, it appears that the “general” concept recognized in Ordinance No. 5-32, found its way into the specific language of Zoning Ordinance 59-C-1.721(b), by virtue of Ordinance No. 6-206, enacted September 1, 1970.

The legislative history does not settle this issue of the Council’s intent in listing only three specific uses in the questioned clause, but it does lead the Hearing Examiner to conclude that the Council was incorporating what it perceived as a “general” concept allowing a transitional use, and not a limiting one. Moreover, “we do not read statutory language ‘in isolation or out of context [but construe it] in light of the legislature's general purpose and in the context of the statute as a whole.’” *Frost v. State*, 336 Md. 125, 138, 647 A.2d 106, 112 (1994), quoting *Forbes v. Harleysville Mutual*, 322 Md. 689, 696-97, 589 A.2d 944, 948 (1991). If the Council had intended to strictly limit the R-T zones to locations either designated in a master plan or next to the three listed uses, it is unlikely that it would have also permitted the zone to be used at locations “*appropriate for residential development at densities allowed in the R-T Zones.*” The word “appropriate” is a very flexible limitation.

While one could still reasonably debate this issue, the Hearing Examiner believes that a reasonable reading of the statute is that this language was intended to be illustrative of highly intensive uses, and should not exclude highly intensive institutional uses such as hospitals and facilities like NIH. In construing a statute, “we seek to avoid constructions that are illogical, unreasonable, or inconsistent with common sense.” *Frost v. State, supra*, 336 Md. at 137, 647 A.2d at 112 (1994).

In any event, this issue does not have to be decided unless the evidence establishes that there is a need for a buffer or transition in this case, for the statutory language permits the zone as a transition or buffer only “*where there is a need*” for it.

Applicant's land planner, Kevin Foster, testified in this regard (10/26/09 Tr. 68):

I also feel that due to this location the subject property has the opportunity to also be a transitional or buffer use between the activities along Cedar Lane and the quasi institutional commercial uses at NIH, and the lower density residential uses to the north. For the proposed rezoning these townhouses will provide that transitional or buffer uses between the single families and Cedar Lane and NIH.

Mr. Foster also noted that the Bethesda-Chevy Chase Master Plan calls for "a buffer to Cedar Lane and NIH for this site." 10/26/09 Tr. 69. However, the actual language of the Master Plan (p. 52) recommends "[p]reserv[ing] trees to buffer from Cedar Lane and NIH," not adding townhouses. Mr. Foster admitted that the buffer recommended in the Master Plan was for the R-60 Zone. 10/26/09 Tr. 69.

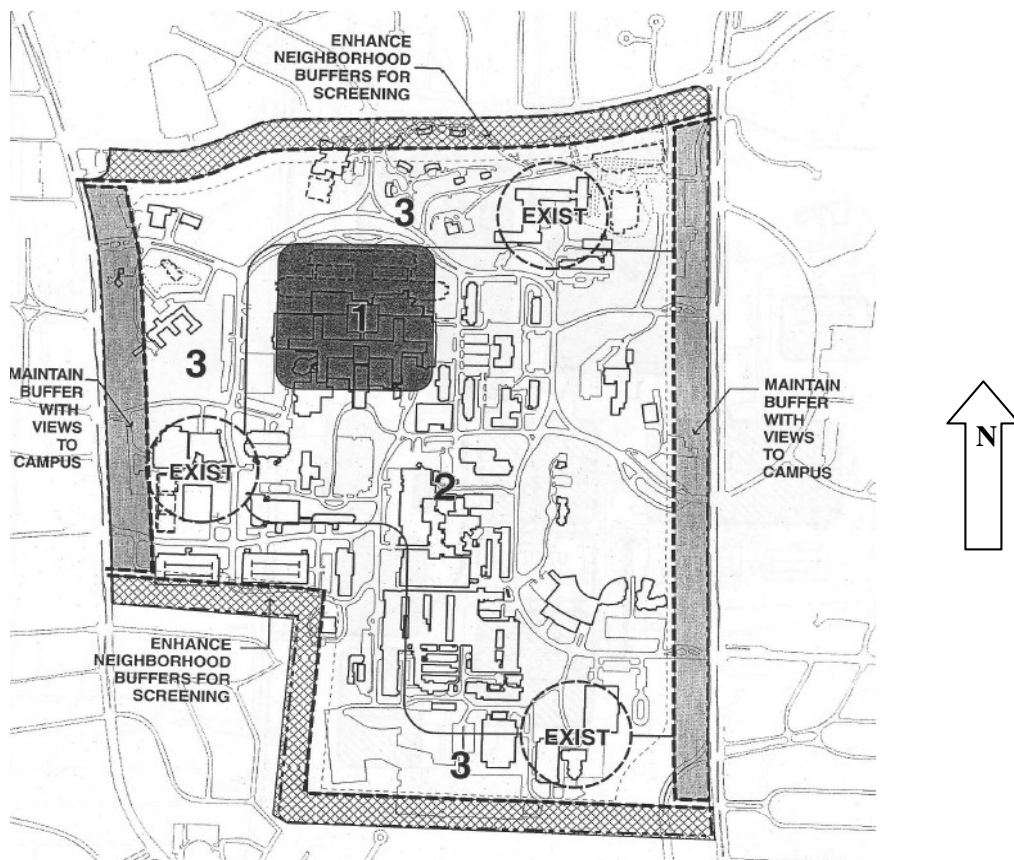
As mentioned in Part III. J. of this report, the opposition produced evidence that there is no need for an additional buffer or transition at this site. There was testimony from the community that large buildings on the NIH campus were either not visible or did not visually impose upon their neighborhood (10/30/09 Tr. 196-197, 209-210, 230-231). This testimony was supported by photos of NIH taken from the neighborhood (Exhibits 128(a) through (f)), which have been reproduced on pages 40-41 of this report. It appears from these photos that NIH buildings do not create an unsightly streetscape, as viewed from NIH's northern neighborhood.

Finally, the opposition introduced the NIH Master Plan, which included a March 2005 Supplement (Exhibit 133). It has numerous provisions that protect the community with adequate buffers internal to NIH. One of the Plan's basic goals is to "Enhance and respect the stability and integrity of the surrounding residential community." (Page 7 of Chapter 1, 4<sup>th</sup> bullet point). The same is said in Chapter 2, on page 13, regarding Goal 4. On page 14 of Chapter 2, there are sub-bullets that describe this goal. The first sub-bullet reads, "Conserve, enhance and increase the campus perimeter buffer zones, especially bordering the residential areas." The fourth sub-bullet reads, "Establish the scale and height of future NIH facilities so that they have no adverse impact on adjoining neighborhoods or other cultural resources." Following sub-bullets specify goals to "Minimize future

construction near the adjoining residential neighborhoods;” “Protect adjoining neighborhoods from intrusion of NIH traffic, parking, noise, and intrusive lighting;” and “Endeavor to ensure that the NIH and its activities do not contribute to security or safety issues in adjoining neighborhoods.”

Section 3.8.3 of the NIH Master Plan discusses its relationship to the local development plans. The fourth paragraph, at page 51 of Chapter 3, reads, in part, “The NIH Master Plan 2003 update is compatible with the land use recommendations of the Bethesda-Chevy Chase Master Plan. The Plan neither requires nor applies pressure to change existing and future recommended land use and zoning. . . .”

Section 5.2.4, on page 29 of Chapter 5, “proposes that all buffer zones be maintained as extending 250 feet inward from the NIH property line.” Figure 5.1.4(d) shows the 250-foot landscaped buffer zone on the north end of the campus, which will be enhanced under the NIH Master Plan. It is reproduced below:



On page 33 of chapter 5, the Plan specifies, “To the north along West Cedar Lane, the predominantly residential quality of the NIH campus is compatible with the adjacent neighboring community, but it should be augmented with evergreen screening and ornamental plantings.” Permitted buildings heights are scaled down to zero at the northern fence.

This evidence establishes that NIH’s intent is to maintain its 250 foot buffer, and even enhance the screening on the northern edge, abutting West Cedar Lane. As such, it provides strong support for the opposition’s argument that there is no need for another buffer between NIH and the community to its north. Moreover, the stated intent of the NIH Master Plan is to “neither require[] nor appl[y] pressure to change existing and future recommended land use and zoning . . .” in the neighboring community. It is thus ironic that this Applicant is attempting to change the zoning of the subject site in a stated effort to support the efforts of NIH and its graduate students. That effort would seem to contradict NIH’s own Master Plan.

Of course, the NIH Master Plan is not binding in any way in these proceedings; however, its language does undercut Applicant’s claim to be supporting NIH’s goals by requesting a rezoning in the adjacent community. More importantly, it establishes that there is already a 250 foot buffer between the Maplewood community and NIH and that it is likely to be maintained. That evidence undermines Applicant argument that its proposed townhouses are needed for a transition from NIH.

Technical Staff also found that there was no need to use the proposed townhouses as a buffer or transition (Exhibit 85, p. 17):

. . . the ordinance requires that there must be a need for the transition. In this case, the part of the NIH campus closest to the subject site consists of residential appearing buildings that face inward towards the NIH campus and are set back approximately 80 feet from the subject site. These buildings are shielded by trees, sidewalks, and fencing. Even if the subject site qualified for a transitional use, *the need* for a transitional use cannot be justified at this location. As far as the need for a transitional use from the adjacent nursing home, the nursing home is an approved special exception and as such has been found to be compatible with neighboring properties. [Emphasis in original.]

Given this evidence, the Hearing Examiner finds that Applicant has failed to establish that there is a need for an additional transition or buffer between NIH and the community to the north. The application therefore does not satisfy the “buffer-transition” prong of the purpose clause.

We now turn to the third alternative in the purpose clause, whether the RT-8 Zone is “*appropriate for residential development at densities allowed in the R-T Zones.*” This alternative turns on whether the proposed RT-8 Zone would be compatible with the existing densities in the surrounding area. The compatibility/density issue has been discussed at length in Part III. J. of this report (pp. 41-48). As stated therein, the proposed RT-8 density would not be compatible with surrounding residential development and would therefore not be appropriate for the subject site.

Having failed to satisfy any of the three alternatives in the RT-8 Zone purpose clause, the Hearing Examiner concludes, as did Technical Staff and the Planning Board, that the application must be denied.

Nevertheless, it should be observed that Applicant’s proposal does meet the development standards and special regulations of the RT-8 Zone, as demonstrated in Part III. F. of this report. Most significantly, the maximum amount of building coverage is specified in Zoning Ordinance §59-C-1.73 as 35 percent in the RT- 8 Zone,<sup>37</sup> and Applicant’s revised SDP (Exhibit 146(a) is proposing 17% percent building coverage, considerably less than the maximum permitted. In the same way, the Zoning Ordinance specifies a minimum of 50 percent green area, and Applicant’s revised SDP is proposing to provide 67 percent green area. However, the Hearing Examiner notes that these are not binding elements, and if the rezoning is approved, these figures may change considerably at site plan, as long as they do not exceed statutory maximums and minimums.

In sum, the subject application meets the development standards of the RT-8 Zone but not its purpose clause. The Hearing Examiner finds that the proposed use is neither transitional nor

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<sup>37</sup> Applicant argues that the maximum building coverage is 40%, but the Hearing Examiner disagrees. See footnote 11 on page 23 of this report.

appropriate for the subject; nor is it designated by the Master Plan for the proposed zoning. Most importantly, it would not be compatible with the existing R-60 neighborhood in which the subject site is located.

### **B. Compatibility**

An application for a floating zone reclassification must be evaluated for compatibility with land uses in the surrounding area. For the reasons discussed in the preceding section and at length in Part III. J. of this report (pp. 41 -54), the Hearing Examiner finds that Applicant has not demonstrated that the proposed development would be compatible with the surrounding area. Technical Staff and the Planning Board agree (Exhibit 85, pp. 17-19 and Exhibit 97, p. 1).

### **C. Public Interest**

The Applicant must show that the proposed reclassification bears sufficient relationship to the public interest to justify its approval. The State Zoning Enabling Act applicable to Montgomery County requires that all zoning power must be exercised:

*“ . . . with the purposes of guiding and accomplishing a coordinated, comprehensive, adjusted, and systematic development of the regional district, . . . and [for] the protection and promotion of the health, safety, morals, comfort, and welfare of the inhabitants of the regional district.”*  
*[Regional District Act, Maryland-National Capital Park and Planning Commission Article (Art. 28), Md. Code Ann., § 7-110].*

When evaluating the public interest, the District Council normally considers Master Plan conformity, the recommendations of the Planning Board and Technical Staff, any adverse impact on public facilities or the environment, and factors such as the inclusion of MPDUs and location near public transportation, especially a Metro station.

The Master Plan and the recommendations of the Planning Board and Technical Staff were considered, at length, in Part III.G., and Parts V. A. and B., of this report. Although the proposed development might fulfill some of the general language of the Master Plan, it would not fulfill other

general language regarding objectives of the plan; nor would it accomplish the goals and objectives of the Sector Plan for this area to the extent that retaining the R-60 Zone would. It is undisputed that it would not conform to the specific recommendations of the Master Plan for subject site or its immediate area. It is a general rule of statutory (and regulatory) construction that the specific governs the general. *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170 (2007), and *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-385 (1992). The specific recommendation for these parcels is that they remain in the R-60 Zone.

Given this record, the Hearing Examiner finds that this development would not be consistent with the recommendations, goals and objectives of the Master Plan; nor is the application supported by Technical Staff or the Planning Board. It should be added that Martin Klauber, Esquire, the People's Counsel, also expressed his opposition to the application, opining that the proposed development would not be compatible and that "NIH bears the responsibility for addressing this problem [*i.e.*, the need for student housing], not the community . . ." 10/30/09 Tr. 287-289.

The impact on public facilities was discussed in Part. III. H. of this report. Based on submissions from Bruce H. Crispell, the Hearing Examiner finds that there is sufficient school capacity for the proposed development, even if it were to house traditional families instead of NIH graduate students.

The evidence also supports the conclusion that the impact on local traffic from this development would be minimal and will clearly meet LATR and PAMR standards. Evidence was also presented that the proposed development would have no adverse effect on utilities or other public services.

The potential for any adverse environmental impact was discussed in Part III. I. of this report. As noted there, "[t]here are no sensitive environmental features on-site or nearby, such as streams, wetlands, floodplain and their associated environmental buffers." Exhibit 85, Attachment 4. Technical Staff reported that the site's forest conservation requirement is shown to be met entirely with on-site



retention of 1.30 acres of forest; however, outside the 1.30 acres of saved forest, the proposal will result in the removal of most of the remaining significant and specimen trees (on the south and southeastern portion of the site). A preliminary forest conservation plan (PFCP) was filed as Exhibit 11, and it will be considered for approval in connection with subdivision. A stormwater management concept plan has been submitted to DPS, and stormwater management will be reviewed at subdivision. Neither Technical Staff nor the Planning Board noted any adverse effect on the environment. Based on this record, the Hearing Examiner is satisfied that any environmental concerns on the subject site are being appropriately addressed.

The proposed development would provide four MPDUs and would be within walking distance of a major employer (NIH) and a Metro station. Moreover, there is no doubt that FAES serves a function (supporting NIH) which is in the public interest; however, that does not mean that allowing FAES to construct a townhouse development in this neighborhood of single-family, detached homes would be in the public interest. As mentioned above, Maryland's enabling statute requires that zoning be exercised "*. . . with the purposes of guiding and accomplishing a coordinated, comprehensive, adjusted, and systematic development of the regional district, . . .*" The compatibility problems established in the evidence, combined with the very specific Master Plan recommendations in favor of retaining the present R-60 Zone for the subject site and the surrounding area and the failure of Applicant to satisfy the purpose clause of the Zone, all weigh against a holding that the proposed rezoning would help accomplish "*comprehensive, adjusted, and systematic development.*" This is not to say that applications for rezoning to RT-8 must strictly follow master plan recommendations; rather, in this case, the other factors necessary to meet the standards for rezoning are not present.

## VI. CONCLUSIONS

Based on the foregoing analysis and after a thorough review of the entire record, I reach the conclusion that the subject rezoning application should be denied for the following reasons:

1. The application would not satisfy the purpose clause of the RT-8 Zone;
2. The application proposes a form of development that would not be compatible with land uses in the surrounding area; and
3. Though the proposal would provide support for an institution (NIH) that operates in the public interest, other indicia, such as inconsistency with the Master Plan, incompatibility with the neighborhood and the recommendation of the Planning Board, militate against a finding that the proposal would be in the public interest. Under all the circumstances, the requested reclassification would not aid in accomplishing a coordinated, comprehensive, adjusted, and systematic development of the regional district.

## VII. RECOMMENDATION

I, therefore, recommend that Zoning Application No. G-882, requesting reclassification from the R-60 Zone to the RT-8 Zone of 4.0795 acres (177,703 square feet) of land known as Part of Lot 7, Lot 8-A, Lot 8-B, Lot 8-C, Lot 8-D, Lot 8-E and Lot 8-F Alta Vista subdivision, located at 9204, 9206, 9208, 9214 Cypress Avenue and 5201, 5205 Cedar Lane, Bethesda, Maryland, be **disapproved.**<sup>38</sup>

Dated: February 12, 2010

Respectfully submitted,

Martin L. Grossman  
Hearing Examiner

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<sup>38</sup> The Hearing Examiner believes that, pursuant to Zoning Ordinance §59-H-8.2(b), a six-member majority of the Council would be required to approve this application because the RT-8 classification is not recommended by the Master Plan, and the Planning Board did not recommend approval. §59-H-8.2(b) provides:

*(b)A resolution granting a classification that is not recommended for the subject property by an approved and adopted master or sector plan or functional master plan requires the affirmative vote of 6 members of the district council. However, if the Planning Board recommends approval of the classification, the resolution requires the affirmative vote of only 5 members.*